

VOL 7 OF 11

No. 74851

**PATRICK HENRY MURPHY, JR.**

APPELLANT

**CAPITAL MURDER**

OFFENSE

**DEATH**

PUNISHMENT

**DALLAS**

COUNTY

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74851

REPORTER'S RECORD

VOLUME 34 OF 61 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS \* IN THE DISTRICT COURT  
VS. \* DALLAS COUNTY, TEXAS  
PATRICK HENRY MURPHY, JR. \* 283RD DISTRICT COURT

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INDIVIDUAL VOIR DIRE

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**FILED IN**  
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 9th day of October, 2003, the following  
proceedings came on to be heard in the above-entitled and  
numbered cause before the Honorable Vickers L. Cunningham,  
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

**ORIGINAL**

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P R O C E E D I N G S

THE COURT: Ms. Hacker.

[Prospective juror in]

THE COURT: Good morning.

PROSPECTIVE JUROR: Good morning.

THE COURT: Would you be Angela Hacker?

PROSPECTIVE JUROR: That's me.

THE COURT: Welcome to the 283rd. Juror No. 4731, Ms. Hacker. Did you have enough time to read the guide I provided for you this morning?

PROSPECTIVE JUROR: Yes, sir, I did.

THE COURT: I also gave you a copy of your questionnaire that you filled out for us back in May to try to help you get up to speed on all the law that we're going to be dealing with here today. I know it's a lot to give someone first thing in the morning. And then you come in and people are generally nervous when they walk in the door, because you haven't been through this before.

PROSPECTIVE JUROR: No.

THE COURT: That's to be expected. And you will find out it's not that bad. The objective here is for you to have a functional understanding of the law.

PROSPECTIVE JUROR: Okay.

THE COURT: The attorneys are going to visit with you about the law, help you understand it, and at

1 the end of the process I have two questions that I have to  
2 ask. Number one is, do you, in fact, understand the law?  
3 And, number two, can you follow the law? I have a big  
4 picture here. The only question that I have for you at this  
5 time is will you be able to serve this Court for a period of  
6 two weeks beginning on November 10th?

7 PROSPECTIVE JUROR: Yes.

8 THE COURT: With that, I shall turn it  
9 over to Mr. Shook. You may inquire.

10 MR. SHOOK: Thank you, Judge.

11 ANGELA HACKER,  
12 having been duly sworn, was examined and testified as  
13 follows:

14 DIRECT EXAMINATION

15 BY MR. SHOOK:

16 Q. Ms. Hacker, my name is Toby Shook. I'm going  
17 to ask questions on behalf of the State. And as the Judge  
18 said, there aren't any right or wrong answers. We just want  
19 your honest opinions.

20 A. Okay.

21 Q. Have you ever been on a jury before?

22 A. No, sir.

23 Q. Okay. Usually we talk to jurors in one big  
24 group, but because it's a death penalty case, we have this  
25 procedure of talking to everyone individually. And we don't

1 mean to make you feel like you're the one on trial, since we  
2 put you on the witness stand. Sometimes jurors feel that  
3 way. But we found it's a good way to get information. And  
4 if you have any questions at any time, feel free to ask.  
5 Now, the bailiff mentioned -- we wanted to get you in here  
6 first because you have a sick child today?

7 A. Yeah, I just got a phone call.

8 Q. Okay. So you need to get back and attend to  
9 that?

10 A. Uh-huh.

11 Q. All right. That doesn't look like it's going  
12 to be anything prolonged, though?

13 A. No. He's got the usual, you know, he's in the  
14 nurse's office at the moment. He's fine.

15 Q. Okay. So you have to go to school?

16 A. And pick him up.

17 Q. All right. Let me ask you a little bit about  
18 your job. You said you've always been in magazine sales and  
19 you are currently with, is it, Co-Mag Marketing Group?

20 A. Right.

21 Q. What do you do with them on a daily basis?

22 A. We are the national distributor publisher of  
23 like 300 titles and we distribute them through the local  
24 wholesalers to everywhere you buy magazines on the  
25 newsstand.

1 Q. So on a daily basis, do you travel or are you  
2 just in the office every day on the phone or --

3 A. Um, actually, I just got a promotion  
4 yesterday.

5 Q. Oh, congratulations.

6 A. Thank you. It will require travel once a  
7 quarter to San Antonio, but that's going to be up to me to  
8 schedule.

9 Q. Okay. All right. We asked one question, if  
10 you have known anyone that's been through the criminal  
11 justice system that's close to you. And you had a sister  
12 that looked like she had some trouble back in '97, '98.  
13 What all did that entail?

14 A. Well, she was arrested for, I think it was  
15 credit card abuse, stolen credit card, with the intent to  
16 buy jewelry and hock it for drugs. She was addicted to  
17 methamphetamines.

18 Q. Okay. And she wound up getting probation?

19 A. Uh-huh.

20 Q. And rehab?

21 A. Right. And moved back to Arkansas.

22 Q. Okay. From what you know about the case, do  
23 you feel she was treated fairly?

24 A. I do.

25 Q. Okay. All right. Let's talk a little bit



1 about how you feel about the death penalty. On your  
2 questionnaire we asked that at the beginning and you said  
3 you are in favor of it in certain cases where it's  
4 appropriate. So I take it as far as the law goes, you do  
5 favor the death penalty?

6 A. Correct.

7 Q. Kind of tell us, you know, in your own words  
8 why you favor it and the purpose you feel it serves society.

9 A. Um, well, like I said, I think in certain  
10 cases that it is -- it's necessary. I, you know, like I  
11 said, I've never, there are certain things I don't even  
12 discuss. I just discuss them with close friends, and that  
13 would be one of them, the politics. And I understand we  
14 discuss it here, but -- and, obviously, my husband and I  
15 discuss it. We don't share the same views. But I do think  
16 it's necessary for certain instances, crimes.

17 Q. Okay.

18 A. I do.

19 Q. What types of crimes come to mind when you  
20 think it could be appropriate in?

21 A. Um, well, ones that come to mind to me are  
22 children, you know, kidnapped and abused and murdered. That  
23 would definitely be one that I would lean to. Intentional,  
24 intentional death of another person. I believe that that's  
25 a legitimate consequence for the actions.

1 Q. Okay. Have you followed any cases in the  
2 media locally or nationally that involved a capital murder  
3 case or death penalty case?

4 A. I don't really follow any of it. I'm -- with  
5 three children, and I don't use this as an excuse, I try not  
6 to have any of that at home.

7 Q. Pretty busy, I guess?

8 A. Exactly. Well -- and I just don't want my  
9 children exposed to certain things on the news and TV. So I  
10 don't per se follow everything. I can't tell you that I  
11 haven't heard mention of certain cases. At this moment I  
12 honestly can't think of a specific name.

13 Q. Nothing that closely?

14 A. No, no.

15 Q. Now, obviously, every one, almost every one of  
16 our jurors has heard something about this case.

17 A. Sure.

18 Q. And we ask that about -- it got a lot of  
19 publicity when it occurred and some afterwards. So we ask  
20 each juror what they remember seeing on TV or the news.  
21 What details do you recall?

22 A. Um, like I stated in this questionnaire, just  
23 Mr. Hawkins' name, obviously, and Patrick Murphy's name and  
24 him coming out of the -- I guess it's when they arrested him  
25 in the trailer.

1 Q. Right.

2 A. I do remember that.

3 Q. Okay.

4 A. That they had, it was a negotiation, and they  
5 came out.

6 Q. Did you follow any of the subsequent court  
7 proceedings at all here in Texas?

8 A. No.

9 Q. Okay. What we -- the bottom line we have to  
10 ask is if you think that would affect you in any way?

11 A. I don't think it would.

12 Q. Okay. The jurors just have to be able to make  
13 their decisions based on what they hear in the courtroom.

14 A. Sure. That's my plan. That's what I would  
15 to.

16 Q. Okay. Now, as far as your views on the death  
17 penalty, how do you think those were formed? Was it just as  
18 you grew up over time? Is it something that you have always  
19 believed in since you were an adult or was there something  
20 in your past that caused you to believe this way, one event,  
21 or is it just something you matured into?

22 A. I think it's something I've matured into.  
23 Just, you know, through seeing things that I've seen and  
24 coming into my own, my own beliefs, you know. I wasn't  
25 raised in a house where it was something that they both

1 believed. My parents didn't. But I think it's just  
2 something I have matured into.

3 Q. Okay. And we asked the one question about if  
4 anyone close to you disagrees with it or how they feel about  
5 it and you said your spouse actually takes the opposite  
6 view?

7 A. Right.

8 Q. Have y'all ever had any detailed discussions  
9 about it?

10 A. Well, we do, but we choose to allow the  
11 disagreement. I understand his views and he can have his  
12 and I can have mine.

13 Q. What are his views on it?

14 A. He doesn't think that it's necessary. He  
15 doesn't think that it's a deterrent. He thinks that there  
16 are innocent -- not innocent, that the chance of innocent  
17 people being put to death should outweigh, you know, the  
18 death penalty of those that are guilty.

19 Q. Okay.

20 A. He's for, you know, lifetime incarceration.

21 Q. All right. Have you talked to him now -- you  
22 know, when you got called down for the big panel, he knows  
23 you're on a death penalty case. It's always a concern of  
24 ours. We don't want to break up any marriages --

25 A. Right.

1 Q. -- or cause any strife.

2 A. You wouldn't.

3 Q. And then people do believe, you know, they  
4 have strong opinions on the death penalty. Do you think  
5 that would cause any conflict, if you were seated on this  
6 type jury?

7 A. I don't think so. Like I said, we allow each  
8 other our own opinions. And we're married, but we're also  
9 individual thinkers.

10 Q. Okay. We want to make sure of that. We don't  
11 want to cause any domestic issues.

12 A. No. I don't think there would be.

13 Q. Okay. In Texas -- you have seen the packet  
14 there. There's only certain murders that qualify in our  
15 death penalty statute. They have to be intentional  
16 killings. You know, it's not in self-defense. It's not an  
17 accident.

18 A. Right.

19 Q. So it's an unjustified homicide plus something  
20 else. I mean, we have a lot of brutal killings that you  
21 can't get the death penalty for. I could turn here and if I  
22 don't like the tie Mr. Wirskye's wearing or he's gotten on  
23 my nerves and I could take a gun out and just execute him,  
24 laugh about it, I couldn't get the death penalty. I could  
25 get life in prison, but not the death penalty.

1                   The death penalty is an intentional  
2   killing and the examples are that it occurs during another  
3   felony, such as a robbery. If I go into a 7-Eleven and  
4   shoot the clerk down, burglary, come into someone's home,  
5   murder during a rape, during a kidnapping, that sort of  
6   thing, during an arson. Also, murder of specific  
7   individuals such as a police officer on duty, fireman on  
8   duty, murder of a child under the age of six, murder of more  
9   than one victim, like a serial killer situation, or mass  
10   murder situation, or murder for hire, someone does it for  
11   money or profit.

12           A.       Okay.

13           Q.       As far as that list goes, do you feel those  
14   are the types of crimes you feel are appropriate for  
15   consideration?

16           A.       I do.

17           Q.       Okay. Now, another area I want to talk to you  
18   is what we call the law of parties. And it's more commonly  
19   known, I think, as accomplices. Any crime can be pulled off  
20   by more than one person. Sometimes several people get  
21   together and commit a crime. Some of them have more of a  
22   role than others and the law says that if you are actively  
23   participating in a crime, you can be held accountable.

24                   And capital murder is no exception. You  
25   may have some situations where the actual, you may have one

1 triggerman or the one person that murders the individual,  
2 but you may have several others that have assisted at some  
3 point in the crime.

4                   An example I give is let's say  
5 Mr. Wirskye and I and a third man decide we want to rob a  
6 bank in our neighborhood. And we get together a plan. It's  
7 going to call for this third guy to be our getaway driver.  
8 He'll drive us up, keep his car running right outside the  
9 bank, and yell if anyone is coming. And we'll run in. I  
10 have a gun. I point it at everyone and get their hands in  
11 the air. And once I have them subdued, Mr. Wirskye is going  
12 to run in there and get behind the tellers' counters and  
13 start loading the cash up in a big bag.

14                   Then during the course of that robbery, I  
15 intentionally kill one of the tellers. Maybe I don't like  
16 the way she looks at me or maybe one of the tellers is going  
17 for an alarm and Mr. Wirskye warns me, so I shoot them. We  
18 leave and we're caught soon afterwards.

19                   Obviously, I can be prosecuted for the  
20 death penalty because I intentionally murdered someone  
21 during a robbery. The law says, though, that Mr. Wirskye  
22 and the getaway driver could, also, if the jury believes  
23 they are actively involved in the crime as parties or as  
24 accomplices. In fact, under certain facts, they could even  
25 get the death penalty.

1           People feel differently about that aspect  
2 of the law. And we like to get everyone's gut opinion, no  
3 matter what the law is. Some people come in and tell us, I  
4 believe in the death penalty, but from my personal point of  
5 view, I think it's a just punishment for the actual killer,  
6 the person that causes the death. If there is an accomplice  
7 there that didn't actually cause the death, I would reserve,  
8 if it were up to them, maybe a life sentence or a long term  
9 of years, a different type of crime, robbery, but not the  
10 death penalty. I don't think it's fair, if you don't take a  
11 life, to have your life taken.

12           Other jurors take the opposite view and  
13 feel that it's fair that an accomplice could be prosecuted  
14 and could get the death penalty. But people feel  
15 differently about that and we ask every juror their honest  
16 opinions about how they personally feel about that.

17           A.       Well, I would think a willing accomplice and  
18 the circumstances could be -- I mean, and should be,  
19 probably, if the circumstances, I would have to know them  
20 but like the scenario you set up, willingly going into that  
21 situation and contributing, if you will, I would think that  
22 that would be justified.

23           Q.       So the accomplices in my example are the types  
24 you feel it could be justified because they willingly  
25 participated in the process?



1           A.       You know, I will go a little further. I'm not  
2     sure about the -- it's kind of a gray. I'm not sure about  
3     the driver. Does that make sense? If your accomplice was  
4     in there, I would think the one in, that's just my opinion.  
5     That comes to mind at the moment.

6           Q.       Why do you think that's fair about the one in  
7     there?

8           A.       Again, it's a choice to participate. And  
9     being involved in this case, the murder of that teller, but  
10    that's just my opinion on that one.

11          Q.       Could the actual getaway driver be someone you  
12    think could be deserving, if there were other facts  
13    involved, that sort of thing?

14          A.       I guess there could be, you know, if the facts  
15    were there.

16          Q.       Okay. What types of factors do you think is  
17    important about an accomplice? The fact that they are  
18    actively participating in it or what?

19          A.       You know, um, I don't know. I'm kind of going  
20    back and forth on this one. I know I've never even thought  
21    about it. I guess he's involved in it, also, but maybe --  
22    and this sounds silly, but the proximity to the murder and  
23    being in there, like I said, willingly and knowing what was  
24    going on and what they were doing. That's just the way I  
25    would lean.

1 Q. Okay. Now, the trial is divided into two  
2 parts. There's the guilt/innocence stage where we have to  
3 prove the indictment. And if we do do that, we move to the  
4 punishment phase where you'd get additional evidence. At  
5 the close of that evidence is when you get these questions,  
6 and we'll go over these in a little more detail in a minute.

7 But, basically, what the State must prove  
8 is that the defendant would be a continuing danger to  
9 society, that he either caused the death or anticipated that  
10 a death would occur, and that there's not sufficient  
11 mitigating evidence to warrant a life sentence.

12 If those questions are answered yes, yes,  
13 and no, then the defendant would receive the death penalty.  
14 If they are answered any other way, it would be a life  
15 sentence. But you don't write death or life in, but it's  
16 determined by how the jury answers those questions.

17 A. Right.

18 Q. Are you familiar with the method of execution  
19 in Texas?

20 A. Um, lethal injection, correct?

21 Q. That's right. That's right. You probably  
22 know from living here that Texas actually does execute  
23 inmates from death row. Some states have it and never  
24 impose it really, but Texas does. In fact, Texas leads the  
25 nation in executions.

1           A.       Right. I do know that.

2           Q.       They are often publicized, the details of  
3 them. And the laws and procedures are the same in each  
4 case. And they would be the same in this. If the defendant  
5 were sentenced to death, the Judge would -- he would be sent  
6 to death row and at some point in time given a date of  
7 execution. Under our procedures on that date or the day  
8 before, he's moved to downtown Huntsville where all  
9 executions take place.

10                   On the date of his execution he's given  
11 time with family, friends, a minister, a last meal. But at  
12 6:00 p.m. by law all executions take place. And you've  
13 probably seen photographs of that room that often appear on  
14 the news or in the newspaper, that gurney which has leather  
15 straps. There are visitors that are brought in to witness  
16 the execution. There's one room for witnesses from the  
17 victim's side and one for the defendant's.

18                   The defendant would be brought in by  
19 force, if necessary, placed on that gurney, secured by  
20 straps, needles are placed in his arm. Tubes go to another  
21 room where the executioner sits. And at that point in time  
22 the warden allows him a last statement, which is often, you  
23 may have read some of them in the paper. He may ask for  
24 forgiveness. He may protest the death penalty. He may  
25 proclaim his innocence.

1 But after that statement is given the  
2 warden will signal the executioner who injects three lethal  
3 chemicals which will collapse his lungs, stop his heart, and  
4 then cause him to lapse into a coma. The process takes  
5 about 15 seconds, and at the end of it he will lay dead on  
6 that gurney.

7 Now, I don't mean to be morbid to go into  
8 that, but it's one thing to talk about it, as you said, with  
9 friends or family members philosophically, and quite another  
10 when you realize you may be on a jury making these  
11 decisions.

12 We have some folks we talk to that are  
13 against the death penalty on religious or moral grounds and  
14 can't serve. They would be fine on a different case. We  
15 have others that are very much for the death penalty and  
16 they really can't be fair. We have others that are for it  
17 and can serve. And we have others that are philosophically  
18 for it, but upon reflection they really aren't comfortable  
19 and can't make these decisions. And that's fine, too, we  
20 send them on to other cases, eventually.

21 You have told us that you do believe in  
22 the death penalty in certain types of cases. We know we  
23 can't preview the facts, and you've never been in this  
24 situation, but as best you know yourself, do you feel you're  
25 the type of person who could make these decisions, if the

1 State proves this to you beyond a reasonable doubt?

2 A. I do.

3 Q. And why do you feel that?

4 A. Well, like I say, I do believe in it with --  
5 if I saw all the facts and that was the decision that we  
6 came to, but we would just have to go through with it, you  
7 know. And what you described is very disturbing, but, I,  
8 you know, I can handle that. I would be fine and make the  
9 decision that I best -- that I thought was best in this  
10 case.

11 Q. And I can't get into the facts, obviously, but  
12 I talk about that accomplice situation because that's the  
13 theory of law we are prosecuting this case under, that the  
14 defendant is not the triggerman, but we're prosecuting him  
15 under that law of parties.

16 Do you feel, then, from how you feel  
17 about the law that you could make a decision about ending a  
18 person's life that is not the actual triggerman?

19 A. I feel I could make the decision.

20 Q. Okay. Let's talk for a minute about these  
21 Special Issues and I want you to take a minute to read  
22 Special Issue No. 1 to yourself.

23 A. Okay.

24 Q. This question asks the jurors to make a  
25 prediction about the future, how he's going to behave in the

1 future. Do you feel that you could answer that question, if  
2 given enough information?

3 A. I do.

4 Q. What kind of things would you want to know  
5 before you answer that question?

6 A. Um, how the past, his past, his --I guess you  
7 would call it a record or -- that would be a huge  
8 determining factor in my opinion.

9 Q. Okay. That type of information is available  
10 and admissible in this portion of the trial. If they've  
11 ever been convicted, you can even hear from the witnesses.  
12 All their background, good and bad, can come forward. And  
13 then, of course, you get to look at the crime itself and  
14 their role in and reevaluate that again.

15 It starts out with a no answer and then  
16 must be proven beyond a reasonable doubt that it should be  
17 answered yes. You have to under the law reevaluate the  
18 evidence and then determine if the State has proven its  
19 case. Do you feel you could do that?

20 A. I do.

21 Q. Okay. Then, if you would, just read Special  
22 Issue No. 2 to yourself. That's the Special Issue question.  
23 That asks -- it kind of goes in three parts. If you believe  
24 from the facts the defendant actually caused the death, then  
25 you would answer it yes. But if it's an accomplice

1 situation, you can still answer it yes, if they intended to  
2 kill the deceased or another or anticipated that a human  
3 life would be taken.

4 And that's how that works. Now, we  
5 can't open up someone's mind and tell you what they intended  
6 in an accomplice situation. But we can put on all the  
7 relevant facts and you can draw reasonable conclusions about  
8 their -- from their actions.

9 A. Right.

10 Q. Do you feel you could do that?

11 A. I do.

12 Q. Okay. That starts out with a no answer and  
13 the State must prove it should be answered yes. Then this  
14 last question is a Special Issue. It's the last question  
15 you get. You don't get to it, unless you have found the  
16 defendant guilty, you've found that he either intended the  
17 death to occur or did cause the death, and then you look at  
18 this Special Issue question. If you'd take a moment to read  
19 that to yourself.

20 A. (Prospective juror complies.)

21 Q. That question, you see, covers a little bit of  
22 everything.

23 A. Uh-huh.

24 Q. And you are not required to be able to tell us  
25 what mitigation evidence is and we can't tell you. There's

1 no definition for it.

2 A. Right.

3 Q. You just have to be able to keep your mind  
4 open to it.

5 A. Right.

6 Q. But as you sit there today, does anything come  
7 to mind that you might view as potentially mitigating  
8 evidence?

9 A. I can't think of anything at the moment, not  
10 particularly.

11 Q. Most jurors tell us that, so don't feel bad.  
12 We hope you don't think about these issues. But sometimes  
13 background comes up in these types of cases.

14 A. Uh-huh.

15 Q. The way a person was raised, maybe they came  
16 from a bad home, maybe a poor environment. Maybe they were  
17 physically or mentally abused. Some jurors tell us, I would  
18 view that as mitigating, if it were severe.

19 A. Right.

20 Q. We have other jurors tell us, no, I know a lot  
21 of people or I've heard of people that come from that  
22 environment and they don't commit capital murders.

23 A. Right.

24 Q. And actually really wouldn't view that. Do  
25 you feel one way or the other about that type of background



1 information?

2 A. I guess I would tend to -- I mean, you know,  
3 all of us have had some sort of dysfunction in our lives.  
4 And I'm not sure that that should be a reason and excuse for  
5 continued repeated behaviors, detrimental behaviors.

6 Q. Okay. Again, you just have to keep your mind  
7 open to it. Now, sometimes you hear from psychiatrists or  
8 psychologists in this portion of the trial. They can be  
9 called by one side or the other. They can give you opinions  
10 about future danger, oftentimes about mitigation, why a  
11 person they feel acts a certain way or something in his  
12 background caused him to act that way.

13 Some people view those experts, they give  
14 a lot of value to their opinion, really respect them, think  
15 they can give a lot of insight. Other jurors almost ignore  
16 them. They don't value them. They don't think they -- you  
17 know, kind of hokus-pokus-type things. And then other  
18 jurors tell us, I'd look at it, but it wouldn't have any  
19 particular weight, just like any other witness. How do you  
20 feel about those types of experts?

21 A. Well, I'd have to hear their opinions and  
22 then, you know, judge them on what they said at that moment,  
23 and my -- and not opinion of them, but their credibility,  
24 what their opinions are versus mine. But I think I could,  
25 you know, be open to hearing it.

1 Q. Okay. Let me go back to your questionnaire  
2 just for a moment.

3 A. Okay.

4 Q. One of my favorite pages is page 15 because  
5 that's the one where we ask everybody who they like or  
6 dislike on men and women. And I don't know if it really  
7 does us any good, but it always gets interesting answers,  
8 and sometimes we ask a follow up. Some of them are obvious.  
9 But you had, it looked like, various interests to me. You  
10 had Collin Powell, who a lot of people put him down, and  
11 Rudy Giuliani has gotten a lot since September 11.

12 A. Sure.

13 Q. And then Van Morrison. Why did you choose  
14 him?

15 A. Well, I'm Irish. Actually my middle child is.  
16 They share the same birthday by design. It was a scheduled  
17 Caesarean. But, anyway, I just -- he's a poet. He's a --  
18 you know, writes from his heart.

19 Q. Okay.

20 A. That's why I chose Van.

21 Q. Ann Richards, a lot of people put her down.

22 A. Really?

23 Q. Because they like her, I guess, you know,  
24 she's --

25 A. It's her spunk.

1 Q. Spunk, exactly. Maya Angelou, again, a lot of  
2 people put her down because of, you know, her works. And --  
3 but I haven't seen a lot of Emmylou Harris, maybe, different  
4 parts of Texas I probably would.

5 A. Yeah, well, my life and, you know, from early  
6 on to now is very music -- music is involved in everything  
7 that I do really, daily. And my children, my first was  
8 named after Dylan, Bob Dylan. I know this is crazy. You'll  
9 think I'm really nuts. My daughter Julia is after my  
10 favorite Beatles song that John Lennon wrote.

11 Q. Oh, okay.

12 A. My whole life is just -- it's just been the  
13 one constant and I can relate everything to it.

14 Q. Now, do you have a dog?

15 A. A dog? I have two dogs.

16 Q. What are their names?

17 A. Sadie and Sam. They're named after --

18 Q. No, that's okay. I take it, then, you don't  
19 like Eminem's music?

20 A. Oh, no, no. I'm more old school.

21 Q. All right.

22 A. Even before my time.

23 Q. That's all the questions I have at this time.  
24 Do you have any questions of us?

25 A. I don't at the moment. Thank you.

1 MS. BUSBEE: This has nothing to do with  
2 what you just said. Your Honor, we've reached an agreement  
3 on this juror.

4 THE COURT: Okay. Ms. Hacker?

5 PROSPECTIVE JUROR: Yes, sir.

6 THE COURT: The parties have agreed to go  
7 ahead and excuse you from service in this case, so that way  
8 you can take care of your sick child.

9 PROSPECTIVE JUROR: Okay. Thank you.

10 [Prospective juror out]

11 THE COURT: Mr. Gossage.

12 [Prospective juror in]

13 THE COURT: Good morning, Mr. Gossage.

14 How are you?

15 PROSPECTIVE JUROR: Good morning.

16 THE COURT: We've got Jay Anthony  
17 Gossage, juror No. 4656. Sir, I understand that you were  
18 the first one here this morning?

19 PROSPECTIVE JUROR: Yes.

20 THE COURT: Thank you so much. We wanted  
21 to get Ms. Hacker in. She had a sick child at school that  
22 she needed to go pick up, so --

23 PROSPECTIVE JUROR: Oh, okay.

24 THE COURT: I usually take the first one  
25 in, unless I've got something like that and thought I'd just

1 give her an extra 30 minutes to take care of her because it  
2 could be another hour and a half for her to wait, so --

3 PROSPECTIVE JUROR: Yeah.

4 THE COURT: I apologize for having you  
5 wait, but at least you understand why. Mr. Gossage, have  
6 you had an opportunity to read the guide I provided for you  
7 this morning?

8 PROSPECTIVE JUROR: Yes.

9 THE COURT: Also, I gave you a copy of  
10 your questionnaire that you filled out back in May.

11 PROSPECTIVE JUROR: Yes.

12 THE COURT: That's for you to refer to or  
13 if any of the attorneys want to follow up and have you  
14 expound on some of your answers, you'll have it before you  
15 to refer to. This is a process by which you can ask  
16 questions. We want you to get up to speed and have a  
17 functional understanding of the law that we're dealing with.  
18 You are certainly not expected to understand it all and give  
19 it all back to me at this point.

20 But after this interview we hope that you  
21 will be able to understand it and that's, in fact, the  
22 question that I have to ask at the end is, number one, do  
23 you understand the law? And, number two, can you follow the  
24 law? That's the big picture I have to look at.

25 The only question I have for you at this

1 time, sir, is will you be able to serve this Court for two  
2 weeks beginning on November 10th?

3 PROSPECTIVE JUROR: I guess so, yes.

4 THE COURT: Thank you, sir. Mr. Wirskye?

5 MR. WIRSKYE: May it please the Court?

6 JAY GOSSAGE,

7 having been duly sworn, was examined and testified as  
8 follows:

9 DIRECT EXAMINATION

10 BY MR. WIRSKYE:

11 Q. Mr. Gossage, how are you this morning?

12 A. Okay.

13 Q. Good. Thanks for waiting, as the Judge said,  
14 and bearing with us. My name is Bill Wirskye and I'll be  
15 the Assistant DA that will be visiting with you for the next  
16 few minutes.

17 What I would like to do is follow up on  
18 some of the information that you were kind enough to provide  
19 for us in that 17-page questionnaire, talk to you a little  
20 bit about your thoughts about the death penalty, since this  
21 is a case where we are seeking the death penalty, and then,  
22 finally, talk to you a little bit about some of the laws and  
23 rules that apply in a capital punishment case like this. Do  
24 you have any questions before we get started?

25 A. No.

1 Q. Okay. You, I guess, own your own company or  
2 work for yourself; is that right?

3 A. Yes.

4 Q. What do you do kind of on a day-in, day-out  
5 basis, or what does your business consist of?

6 A. I do contract computer programming.

7 Q. Okay. We always know it's a financial  
8 hardship for anybody to, especially those that are  
9 self-employed, to be down here for two weeks. But based on  
10 your answer to the Judge, it sounds like something you could  
11 do, if you had to?

12 A. Yes.

13 Q. Probably wouldn't want to?

14 A. Right, correct.

15 Q. Okay. And I think on the last page of your  
16 questionnaire you told us, we asked you what your feelings  
17 were about being chosen as a juror and you said, I would not  
18 like it. Is that from the business reason, or --

19 A. No, I just don't, don't like it.

20 Q. Why not?

21 A. I guess I don't like conflict that much. I'm  
22 not that kind of person.

23 Q. Okay. It looks like you were on a jury  
24 several years ago?

25 A. Yeah, a long time ago.

1 Q. In the '70s?

2 A. Yeah.

3 Q. And that was a murder case?

4 A. Yes.

5 Q. What do you remember about that case?

6 A. It was a robbery of a Stop 'n Go on Lemmon  
7 Avenue. A 19-year-old boy killed a 17-year-old boy.

8 Q. Okay.

9 A. The clerk at the store.

10 Q. Okay. The State -- was the State seeking  
11 death in that case?

12 A. No. I guess the death penalty didn't apply  
13 then.

14 Q. Okay. Based on what you remember, was the  
15 evidence pretty clear?

16 A. Yes.

17 Q. Looks like you found the person guilty?

18 A. Yes.

19 Q. Did the jury set punishment in that case?

20 A. Yes.

21 Q. And I think you put in your questionnaire it  
22 was 99 years?

23 A. Yeah.

24 Q. Was there any conflict on the jury about  
25 coming up with --



1 A. Oh, yeah, oh, yeah, very definitely.

2 Q. Tell us about that.

3 A. Um, I know there was a lot of people that -- I  
4 was younger at that time. And there was some people there  
5 that had kids about that age and they were -- they were  
6 opposed to -- you know, they wanted to give him a lesser  
7 sentence. The guilty, finding him guilty or not, there were  
8 -- there was some who thought the police officers had beaten  
9 the confession out of him, you know, and they were very  
10 adamant about that, and so there was a lot of discussion  
11 about that.

12 Q. Okay. Was that an unpleasant experience for  
13 you?

14 A. Absolutely.

15 Q. Are you sitting there right now thinking you  
16 don't want to go through that again?

17 A. Yes. That's exactly what I'm thinking.

18 Q. Well, do you think you could, if you were  
19 called upon?

20 A. Yes.

21 Q. Okay. Now, you've told us you are in favor of  
22 the death penalty; is that right?

23 A. Yes.

24 Q. Why do you think we should have a death  
25 penalty?

1 A. To prevent another death.

2 Q. Okay. And by that you mean a person can't get  
3 out and do it again?

4 A. That's right.

5 Q. Okay. Is there a particular type of case that  
6 comes to mind when you think about an appropriate death  
7 penalty case? I know from your questionnaire it looks like  
8 you watch "Forensic Files" or "Cold Case Files"?

9 A. Yeah.

10 Q. Is there any case like that that you have  
11 heard or seen or a set of facts that come to mind in your  
12 mind for the appropriate case for the death penalty?

13 A. Disregarding the law. After reading this, I  
14 see that it's a lot more clear. But in my mind it would be,  
15 you know, a murder of a child is the first thing I think of.

16 Q. Okay. And I guess, you know, we asked you to  
17 kind of rank yourself on a scale of 1 to 10 how strongly you  
18 favor the death penalty and you gave yourself an 8, which we  
19 know means different things to different people. And I'm  
20 just curious what that meant to you.

21 A. I can't -- well, even after reading the law,  
22 it appears that if there are extenuating circumstances, I  
23 think is what it said. If somebody -- if somebody could  
24 cause you to go to such rage, and I could feel that that  
25 could happen to me, then I might not -- you know, I might

1 not be for the death penalty in that case.

2 Q. Okay.

3 A. Maybe somebody's hurting my family or  
4 something like that.

5 Q. Okay. But as an 8, I guess, if you feel it's  
6 appropriate, you're pretty strongly in favor of it?

7 A. Yes.

8 Q. Okay. We also ask people, you know, if they  
9 know anyone that's had any experience in the system and I  
10 think you indicated your son?

11 A. Correct.

12 Q. Tell us about that.

13 A. Well, it was -- now, this is my son's side of  
14 the story. They were out at the lake and he got in some  
15 kind of argument over a girl and it was this guy's  
16 girlfriend and he was supposedly going to drown my son. He  
17 was after my son. He was -- he was pretty old, about 18 at  
18 that time. And according to my son, one of his friends hit  
19 the guy with a pole and the guy said my son did it. And I  
20 guess he never did contest that, so that's what it was.

21 Q. Okay. Based on what you know about it, do you  
22 think your son was treated fairly?

23 A. Um, yes.

24 Q. Okay. That particular -- having that in your  
25 life wouldn't affect you in this case in any way?

1           A.       No.

2           Q.       Okay. Let me also run another scenario by  
3 you. You know, we talk to so many people that are in favor  
4 of the death penalty. Sometimes people draw lines when they  
5 talk about a particular type of case. And what I mean by  
6 that is this. Oftentimes, as you can well imagine, crimes  
7 are committed by more than one person. You could have a  
8 group or a gang of individuals that commit a crime, whether  
9 it be shoplifting or capital murder.

10                   The law says that we can actively or we  
11 can prosecute anybody that was actively involved in a crime.  
12 Sometimes you hear about it called the law of accomplices, I  
13 think, is commonly what people think about it. When you are  
14 talking about a capital murder, you may have a situation  
15 where just one of those people involved actually pulled the  
16 trigger or actually took the life. You may have some other  
17 accomplices who didn't actually cause the death, the  
18 nontriggermen accomplices.

19                   Sometimes when we talk to people who are  
20 in favor of the death penalty, they may be very strongly in  
21 favor of the death penalty for the triggerman, the guy that  
22 actually caused the death. But if it were up to them, they  
23 would draw a line and they'd take the death penalty option  
24 away for the nontriggermen accomplices.

25                   For whatever reason, religious, moral,

1 ethical, they just don't feel the death penalty is justified  
2 for the people that didn't actually cause the death, the  
3 accomplices. You know, they may want to lock them up for  
4 life, but they just don't feel the death penalty is  
5 appropriate.

6 And some people we talk to say, you know,  
7 it just kind of depends on the facts and circumstances of  
8 the crime, you know, that type thing. But where do you come  
9 down on that issue, the death penalty for, I guess,  
10 nontriggermen accomplices?

11 A. Well, that's -- well, I would say there would  
12 definitely be cases where I wouldn't want to do the death  
13 penalty for the nontriggerperson, if they were just hanging  
14 out with them, maybe were unaware that, you know, that this  
15 was going to happen.

16 Q. Okay. Let me kind of give you a set of facts  
17 to help you explain what the law is. It sounds like you  
18 wouldn't automatically take the death penalty off the table.  
19 You'd just kind of have to hear the facts?

20 A. Right, correct, yes.

21 Q. Okay. Just to give you an example. Let's say  
22 a buddy of mine and I decide we're going to rob a bank.  
23 Okay? The plan is he's going to take a gun in. He's going  
24 to hold up the tellers. I'm going to come in unarmed, no  
25 weapon, and I'm going to have a bag. And while he's holding

1 up the tellers, I'm going to clean out the cash drawers.  
2 And we're going to make our get-away. And that's the plan.  
3 No one is supposed to get hurt.

4 We go in to do that bank robbery and as  
5 my friend is holding that pistol on the tellers, for  
6 whatever reason, maybe one of them looked at him funny or we  
7 see one of them going for a silent alarm for the police and  
8 I tell him that, but for whatever reason he shoots and kills  
9 one of those tellers. Okay?

10 Obviously, I think you know now from  
11 reading the law, he's committed a murder in the course of a  
12 robbery. That's capital murder in Texas. He can be  
13 convicted of capital murder and face the death penalty,  
14 depending on what the jury thinks.

15 The law also says, depending on the facts  
16 and circumstances, I could be convicted of capital murder  
17 and potentially face the death penalty, even though I had no  
18 intent, you know, that that person was going to get killed.  
19 What do you think about that type of scenario?

20 A. Well, I agree with the law. I mean, if you  
21 had intent and you went in there and you had a gun, whether  
22 you had it or somebody else had it, it's -- you know.

23 Q. Okay.

24 A. That's good enough.

25 Q. Just to be clear, I mean, I had no intent that

1 that person would get killed.

2 A. But you had intent to rob.

3 Q. Had an intent to rob.

4 A. And you knew there was a gun.

5 Q. Okay. And to you that's important?

6 A. Yes.

7 Q. Okay. And that's basically that the law is.

8 There's two ways for an accomplice like me to be found  
9 guilty of capital murder. One is if I actively direct or  
10 encourage or solicit someone to commit capital murder. You  
11 know, maybe I turned to my buddy and said, shoot her, shoot  
12 her dead, she's going for an alarm. Obviously, I would be  
13 guilty. I had the intent.

14 The second way is the situation we talked  
15 about under the law of conspiracy. My buddy and I agreed or  
16 conspired to commit one crime. The murder happened during  
17 that crime. If the jury thinks, like I think you did, that  
18 I should have anticipated that a life would be taken, then I  
19 could be found guilty of capital murder.

20 A. Yes.

21 Q. That sounds like where you are?

22 A. Yes.

23 Q. Exactly what the law is. Let me ask you this.

24 Like so many people we've talked to, you have indicated that  
25 you have heard something about the facts of this case?

1 A. Sure.

2 Q. And, like I said, just 99 percent of the  
3 people we talk to indicate that. The law is that you are  
4 not automatically disqualified just because you have heard  
5 something about the case. You may have even formed some  
6 opinions or impressions about the case.

7 But as long as you can tell us that you  
8 can set those aside, you know, not forget about them. We  
9 could never make anybody forget. But set them aside and be  
10 able to base your verdict just on what you hear in the  
11 courtroom, you would be able to be a qualified juror in the  
12 case. Is that something you think you could do?

13 A. Yes.

14 Q. Okay. What do you remember hearing about the  
15 case, Mr. Gossage?

16 A. Oh, they broke out of prison and there was a  
17 big hunt for them, and they stayed in Carrollton someplace  
18 and that's where I live, so --

19 Q. Okay. So it kind of hit close to home to you,  
20 I guess?

21 A. Yes. And I knew they robbed a store in  
22 Irving, I think, and a police officer was killed.

23 Q. Okay.

24 A. And I think they even ran over him, if I  
25 remember that correct. And I think they caught them in



1 Colorado, if I remember right.

2 Q. Yes, sir.

3 A. And that's about all I remember.

4 Q. Did you -- have you kept up with any of the  
5 other court proceedings that have gone on in these cases?

6 A. No.

7 Q. Okay. And, again, you don't think any of that  
8 would affect your ability to just base your verdict on what  
9 you hear in the courtroom?

10 A. No.

11 Q. Okay. As you probably remember, trials in  
12 Texas are kind of broken down into two parts, the  
13 guilt/innocence part and the punishment part. It would be  
14 the same in this case. It sounds like the same as the case  
15 you served on in the mid '70s.

16 The first part of the trial you are just  
17 concerned with whether the person is guilty or not. You  
18 know, did the State prove to you beyond a reasonable doubt  
19 that indictment that we set out. You know, did we prove to  
20 you what we alleged, basically.

21 And if you found that we did prove it to  
22 you beyond a reasonable doubt, the person is found guilty of  
23 capital murder, we move into that second phase of the trial,  
24 the punishment phase. And this time is a little bit  
25 different than the trial you sat on. You don't just get to

1 choose a number or choose life or death. We ask you to  
2 answer these three questions. And those three questions,  
3 depending on the answers, determines whether the person gets  
4 a life sentence or a death sentence. Does that kind of make  
5 sense to you?

6 A. Yes.

7 Q. And that's kind of the scheme we have. As you  
8 may recall, in the punishment phase of the trial you may get  
9 to hear extra evidence about a person's past, his character,  
10 his reputation, whether he has a criminal history, that type  
11 thing. And we let you listen to that type of information to  
12 help you answer these questions.

13 And that's kind of the scheme we have.  
14 Again, we don't ask you to write in life or death. We just  
15 ask you to answer the questions. Does that make sense to  
16 you?

17 A. Yes.

18 Q. Okay. Sometimes when we talk to people and we  
19 get them down here, people that, I guess, philosophically  
20 are in favor of the death penalty, see a need for it, glad  
21 that it's still around, but sometimes when we talk to these  
22 people and they down to this point when it becomes a little  
23 more real and you are actually in the courtroom and you may  
24 actually make the jury, you know, in a few minutes, and you  
25 are looking at a living, breathing human being down at the

1 end of the table, knowing that, you know, very frankly, it's  
2 our goal that that person be convicted and one day executed,  
3 you know, it becomes something a little bit different to  
4 them.

5 It's no longer abstract. It's very real.  
6 And some people, I think, are uncomfortable doing that or  
7 they have some grave hesitation about being a juror in a  
8 case like that, where so much is at stake, where you have to  
9 make that life or death decision.

10 So before we go any further, I want to  
11 make sure that you at the very least go into this process  
12 with no hesitation about your ability to, you know, to take  
13 pen in hand and answer these questions in such a way that  
14 may ultimately result in the execution of another human  
15 being. Do you think you're that type person?

16 A. Yes.

17 Q. Okay. And why do you say that?

18 A. I just -- I think I could do it.

19 Q. Okay. I just want to make sure, because, you  
20 know, you expressed some concern about being on another jury  
21 and the conflict --

22 A. Right.

23 Q. And, obviously, this is the most serious type  
24 of case in our criminal system.

25 A. Right.

1 Q. And that's why I asked. I want to make sure,  
2 obviously, no one wants to. No one is comfortable doing it.  
3 We probably wouldn't want anybody that wanted to do it. But  
4 we want to make sure that, you know, based on your past  
5 experience that you feel like you are the right type person  
6 for this case.

7 A. Yes.

8 Q. Okay. Fair enough. Let's take a second and  
9 talk about these Special Issues. I know you have got a  
10 chance to look at them before. If you could just go over  
11 them again one more time. They are phrased just a little  
12 bit differently. And once you have had a chance to read  
13 through all three, we'll talk about each one.

14 A. (Prospective juror complies.) Okay.

15 Q. Did you get a chance to look at them? Those  
16 are the three questions. They're called Special Issues.  
17 The Legislature drafted them for capital cases. They  
18 weren't specifically drafted for this case. And, again,  
19 kind of what the law envisions is if you find somebody  
20 guilty of capital murder, you'd start that second phase of  
21 the trial with an open mind as to the answer to these  
22 questions.

23 You hear the extra information in the  
24 second phase of the trial and then you go about answering  
25 these questions. But the law really requires or

1 contemplates that a juror be able to have the mental  
2 discipline to keep that open mind, you know. Even though  
3 you may have found someone guilty of capital murder, you  
4 still have to give them a fair shake in the second part of  
5 the trial and start out with that open mind. Does that make  
6 sense to you?

7 A. Yes.

8 Q. Okay. The first question up there, actually,  
9 is what we call the future danger question. Basically, it  
10 just asks the juror to kind of predict whether there's a  
11 probability that the person would continue or would commit  
12 criminal acts of violence such that they would be a threat  
13 to society. Does that kind of make sense to you?

14 A. Oh, I didn't read it that way. Okay.

15 Q. How did you read it?

16 A. It just looked like it said, would he do it,  
17 but you are saying, would he do it again?

18 Q. Well, the question is, is there a probability  
19 that the person would commit criminal acts of violence, not  
20 necessarily the same crime, but just some criminal act of  
21 violence such that he would be a threat to society, okay?  
22 Basically, is the person a future danger to society?

23 A. Okay.

24 Q. Do you think there's a probability of that?  
25 Does that make sense to you?

1 A. Yes.

2 Q. Okay. Do you see how it kind of asks a juror  
3 to make a prediction about the future?

4 A. Yes.

5 Q. Okay. Is that something you are comfortable  
6 doing?

7 A. Yes.

8 Q. What type of information do you think you  
9 would like in order to answer a question like that?

10 A. Um, knowing his past would definitely be one  
11 thing.

12 Q. That's what most people tell us. And again,  
13 you'd get to hear that type evidence in the second phase of  
14 the trial. Anything else you can think of? Most people  
15 tell us that's the most helpful.

16 A. Yeah.

17 Q. You know, I guess they feel the best predictor  
18 of future behavior is past behavior, a leopard doesn't  
19 change his spots, that type of thing.

20 A. Yes.

21 Q. Okay. A lot of the terms in that question  
22 aren't necessarily defined for us, so we always ask each  
23 juror kind of how they would define certain words in that  
24 question. See that word probability?

25 A. Yes.

1 Q. How would you define that?

2 A. Is there a good possibility that he would do  
3 it?

4 Q. A good possibility? A likelihood?

5 A. Yes.

6 Q. Okay. And that's pretty much what a lot of  
7 people tell us, a greater than not chance, that type thing.  
8 The law says, you know, probability is something more than a  
9 possibility because anything is possible, but something  
10 short of a certainty. We could never prove it to you a  
11 certainty --

12 A. Yes.

13 Q. -- that he would be that future danger. Is  
14 that something you're comfortable with?

15 A. Yes.

16 Q. Okay. Then, also, it talks about those  
17 criminal acts of violence. And as I said, that phrase is  
18 not necessarily restricted to, you know, proving to you that  
19 there's a probability that he would kill again or be  
20 involved in another murder, that type thing. It's just  
21 whatever type of acts or crimes that the juror feels  
22 constitutes violence. You know, threats, assaults, that  
23 type thing. Is that something you are comfortable with?

24 A. Yes.

25 Q. Okay. And then, finally, that word "society."

1 How would you define that or what does that mean to you when  
2 you look at "society"?

3 A. People.

4 Q. Okay. Anyone and everyone he may come into  
5 contact with?

6 A. Yes.

7 Q. Okay. Both out here walking around with us  
8 and people behind bars? Other inmates, guards, wardens,  
9 teachers, that type of thing?

10 A. Yes.

11 Q. Okay. That question, Special Issue 1, starts  
12 off with a no answer. That's the default setting on the  
13 question, okay? It's a part of our burden of proof in the  
14 second part of the trial to prove to you as a juror that the  
15 answer to that should be yes, okay? Does that make sense to  
16 you?

17 A. Yes.

18 Q. Unless we meet that burden, unless we prove it  
19 to you, the answer stays no, okay? Again, the law envisions  
20 or contemplates that a juror bring an open mind to that  
21 second phase of the trial, bring an open mind to these  
22 questions.

23 Sometimes we talk to people that tell us,  
24 you know, very frankly, they say, if I have found someone  
25 guilty of capital murder, I'm always in every case



1 automatically going to think that there's that probability  
2 of future danger, and that question is already answered for  
3 me. I know I'm supposed to keep an open mind. I just  
4 can't, that type thing.

5 And if you feel that way, that's fine.  
6 You just simply wouldn't be a qualified juror. What do you  
7 think about that? Do you think you could keep that open  
8 mind?

9 A. Yes.

10 Q. Okay. Even that late in the process?

11 A. Yes.

12 Q. Okay. Take just a second again and read  
13 Special Issue No. 2. That's a real confusing question.

14 A. (Prospective juror complies.)

15 Q. That question, Mr. Gossage, deals like with  
16 the scenario we've already talked about, about, you know,  
17 accomplices.

18 A. Yes.

19 Q. There's basically three parts to it. If you  
20 think a person actually caused the death, if they were the  
21 triggerman, you would answer it yes. If you think they  
22 didn't actually cause the death, but they intended that  
23 death, you know, in our situation where I told my buddy, go  
24 ahead and shoot and kill her. I obviously intended it, but  
25 I didn't do it. You would answer it yes. Or, finally, if

1 you think that the person anticipated that a human life  
2 would be taken. Kind of what we've talked about earlier.

3 A. Yes.

4 Q. Remember, you can convict me of capital murder  
5 as an accomplice, if you feel that I should have anticipated  
6 that a life would be taken. By the time we get to  
7 punishment, the law has a little higher standard. They said  
8 not only is it should have anticipated, but it's did  
9 anticipate, you know, did the person actually anticipate.  
10 You know, it's not just looking at it to see what they  
11 should have anticipated, but did the person actually  
12 anticipate?

13 A. I see. Okay.

14 Q. Does that make sense to you?

15 A. Yes.

16 Q. Okay. And, again, that question starts off  
17 with that no answer, that default answer, and it's up to us  
18 to prove it to you the answer should be yes. And if both of  
19 those questions are answered yes, then you move to the third  
20 and last question. It's the mitigation question.

21 We ask a juror to kind of go back and  
22 look at all the facts of the crime, look at the facts they  
23 have learned about the person, and ask if there is anything  
24 mitigating there. Is there anything that lessens his  
25 personal moral blame such that his life ought to be spared

1 and he shouldn't be executed, but he should be given that  
2 life sentence? Does that make sense to you?

3 A. Yes.

4 Q. Okay. Do you think it's good we have that  
5 type of question --

6 A. Yes.

7 Q. -- even that far in the process? I guess some  
8 people call it a chance for the jury to show mercy, if they  
9 feel the facts justify it. As you sit there right now, is  
10 there anything that kind of comes to mind that you would  
11 consider mitigating in a case like this?

12 A. Like in this case?

13 Q. Not particularly this case, just any capital  
14 murder case. You know, we can't talk about the facts of  
15 this case. Have you already formed an opinion about that in  
16 this case? I saw you kind of smiling.

17 A. Well, I --

18 Q. If you have, that's fine. A lot of people  
19 have, because they have heard a lot about the case. Have  
20 you already formed an opinion about that in this case?

21 A. Not definitely, no, no, I have not.

22 Q. Okay.

23 A. Yes, you know, it says -- I guess the intent  
24 is the word, if he definitely had the intention.

25 Q. Okay.

1           A.       If he didn't, you know, that might be -- if he  
2 honestly -- you know, if I honestly believed that he had no  
3 intention of hurting anyone, then that would be definitely  
4 --

5           Q.       Mitigating?

6           A.       -- mitigating, mitigating circumstances.

7           Q.       Okay. And I think it's that type thing that  
8 the law wants you to keep an open mind when you look for.  
9 But any other questions about this scheme we have in the  
10 death penalty cases in Texas?

11          A.       No.

12          Q.       Okay. Give me just a second. Mr. Gossage, I  
13 think that's all I have. Thanks for your patience, and  
14 Judge, I'll pass the juror.

15                   MS. BUSBEE: Okay. We have reached an  
16 agreement on this juror, Your Honor.

17                   THE COURT: Mr. Gossage, the parties have  
18 agreed to excuse you from jury service. So you don't have  
19 to worry about being on another contentious jury.

20                   PROSPECTIVE JUROR: Wonderful.

21                   THE COURT: Thank you, sir, and you are  
22 free to go.

23                   PROSPECTIVE JUROR: Thank you very much.

24                             [Prospective juror out]

25                   THE COURT: Ms. Saucedo.

1 [Prospective juror in]

2 THE COURT: Good morning.

3 PROSPECTIVE JUROR: Good morning, how are  
4 you 'doing?

5 THE COURT: How are you?

6 PROSPECTIVE JUROR: Okay. How about you?

7 THE COURT: Doing fine. We've got juror  
8 No. 4558, Ms. Dominga Saucedo; is that correct?

9 PROSPECTIVE JUROR: Correct.

10 THE COURT: Welcome to the 283rd.

11 PROSPECTIVE JUROR: Thank you.

12 THE COURT: Have you had an opportunity  
13 to read the guide I provided for you?

14 PROSPECTIVE JUROR: Yes.

15 THE COURT: I also gave you a copy of  
16 your questionnaire for your review. The attorneys may want  
17 you to look at a particular question and what were you  
18 thinking when you made that answer. It gives you an  
19 opportunity to review that before you come in and begin  
20 thinking about the issues we're going to be discussing.

21 PROSPECTIVE JUROR: Okay.

22 THE COURT: The objective here is for you  
23 to have a functional understanding of the law. This is an  
24 opportunity for you to ask questions to get yourself up to  
25 speed where you can be competent to sit as a juror in this

1 case. Does that make sense?

2 PROSPECTIVE JUROR: Uh-huh.

3 THE COURT: No wrong answers.

4 PROSPECTIVE JUROR: Okay.

5 THE COURT: We just want you to learn,  
6 understand, and able to use it. Fair enough?

7 PROSPECTIVE JUROR: Uh-huh.

8 THE COURT: Only question I have for you  
9 at this time is will you be able to serve this Court for a  
10 period of two weeks beginning on November 10th?

11 PROSPECTIVE JUROR: Um, I should. I  
12 think so.

13 THE COURT: I see some hesitation there.  
14 I didn't ask you did you want to serve the Court for two  
15 weeks. My question is could you?

16 PROSPECTIVE JUROR: Yes.

17 THE COURT: Okay. Thank you so much.

18 Mr. Wirskye?

19 DOMINGA SAUCEDO,  
20 having been duly sworn, was examined and testified as  
21 follows:

22 DIRECT EXAMINATION

23 BY MR. WIRSKYE:

24 Q. Ms. Saucedo, how are you this morning?

25 A. Okay, so far.

1 Q. So far? Are you expecting trouble any minute?

2 A. No. It's just I'm not used to, you know, a  
3 lot of people.

4 Q. My name is Bill Wirskye and I'll be the  
5 Assistant DA that will be talking with you for the next few  
6 minutes.

7 A. Okay.

8 Q. Because this is a death penalty case, we do  
9 jury selection a little bit differently. We talk to people  
10 individually and that's why you're up here on the witness  
11 stand, probably feeling like you're on trial.

12 A. Yeah.

13 Q. A little bit nervous, but try not to be. It's  
14 just -- to the extent possible, just try to make it a  
15 conversation.

16 A. Okay.

17 Q. I've got some questions for you about some of  
18 the information that you were kind enough to give us in that  
19 long questionnaire that you filled out, talk to you a little  
20 bit about your thoughts and feelings about the death  
21 penalty, and then maybe talk to you a little bit about the  
22 law that applies in a death penalty case.

23 A. Okay.

24 Q. What went through your mind when you got  
25 notified that you had to come back for an individual

1 interview in a death penalty case?

2 A. Nervous.

3 Q. Okay. Why are you nervous?

4 A. I don't know, I don't know.

5 Q. Okay. Now, you told us, have you gotten a  
6 chance to look at your questionnaire?

7 A. I did.

8 Q. Okay. You told us on the first page that you  
9 are not in favor of the death penalty; is that right?

10 A. Correct.

11 Q. Okay. Tell us why not.

12 A. Well, at the time, I wasn't.

13 Q. Okay.

14 A. I changed my mind since then.

15 Q. You changed your mind?

16 A. Yeah.

17 Q. Okay. Tell us about that. What caused you to  
18 change your mind?

19 A. Well, just depending, you know, anything that  
20 affects --towards my family, then that probably would be a  
21 lot different, compared to a friend or somebody else.

22 Q. Okay. So if one of your close friends or  
23 family member was the victim, then you could consider the  
24 death penalty, that type of case?

25 A. Yeah, definitely a close family. Yeah.



1 Q. Okay. You understand in that type of case you  
2 couldn't be a juror. We're obviously talking about cases  
3 where, you know, you don't really know anything about or you  
4 don't know anyone involved --

5 A. Uh-huh.

6 Q. -- necessarily. In those type cases, do you  
7 think you could be in favor of the death penalty?

8 A. Um, yeah.

9 Q. Okay. How come?

10 A. Well, they killed somebody. I mean, I would  
11 think they would have to serve some kind of time or  
12 punishment.

13 Q. Okay. Do you remember back in May why that  
14 you checked that you didn't favor the death penalty? What  
15 was going through your mind when you answered it that way  
16 back in May?

17 A. Um, no, I don't.

18 Q. Okay. Like just about everybody that we  
19 talked to, you indicated that you know something or heard  
20 something about this case.

21 A. Uh-huh.

22 Q. It was in the media. It was a high profile  
23 case.

24 A. Uh-huh.

25 Q. And everybody we talk to knows something about

1 it. What do you remember hearing about this case?

2 A. Um, I know it happened in the winter. He went  
3 to some kind of store and then whatever happened, shot, he  
4 got shot.

5 Q. Okay. Do you remember anything that happened  
6 after the shooting?

7 A. Um, they took off and left.

8 Q. Okay. Did you follow the arrest or anything  
9 like that?

10 A. Um, where they located them later, several  
11 weeks later, yeah.

12 Q. Okay. Have you followed any of the court  
13 proceedings that have gone on in these cases?

14 A. I'm sorry?

15 Q. Any of the subsequent trials or court  
16 proceedings, that type of thing?

17 A. I'm still not understanding the question.

18 Q. Okay. Have you heard anything about other  
19 trials in this case?

20 A. No.

21 Q. Okay. Based on what you have heard about this  
22 case, have you already got some idea in your mind what  
23 happened?

24 A. About the incident?

25 Q. Yes, ma'am.

1 A. Yeah.

2 Q. Okay. Have you already formed some  
3 conclusions one way or another about what happened and who  
4 is responsible, that type of thing?

5 A. Um, kind of.

6 Q. Okay. And a lot of people tell us that.  
7 Different people know different amounts about the case and  
8 one reason we talk to so many people is quite a few people  
9 come down here and because this was such a high profile  
10 case, they tell us, you know, I've just heard too much. I  
11 have already formed some opinions or conclusions, like  
12 you've told us you have, and I just really couldn't be fair.  
13 I just know too much about it. I've already got some ideas  
14 or some notions about the case.

15 A. Uh-huh.

16 Q. You know, this case is different than almost  
17 any other case that you would come down here on jury duty.  
18 If you come down here on another murder case, you probably  
19 wouldn't know a thing about the facts and you would be able  
20 to sit over in that jury box with kind of an open mind, a  
21 clean slate in your mind, not knowing anything.

22 But in this case, obviously, you have  
23 told us you've heard about it, you've formed some  
24 conclusions. Do you think you are really the best type  
25 person to be on this case?

1 A. Um, I don't think so.

2 Q. Okay. Why not?

3 A. Um, I don't know. I've got mixed emotions  
4 about it.

5 Q. Are part of those mixed emotions because  
6 you've heard so much about the case and already have some  
7 opinions about the case?

8 A. Um, pretty much.

9 Q. Okay. Would it, based on what you know and  
10 the opinions you have formed, could you be fair to the  
11 person charged, the defendant in this case, in all honesty?

12 A. I'm sure I can, yeah.

13 Q. Okay. Could you be fair to the State?

14 A. Yes.

15 Q. Okay. What opinions have you formed about  
16 this case?

17 A. What opinions?

18 Q. Yes, ma'am.

19 A. Um, about the killing?

20 Q. Yes, ma'am.

21 A. Um, I'm sorry, I'm not too sure what I need to  
22 say.

23 Q. That's okay. I just -- do you have in your  
24 mind an opinion one way or another, whether he's guilty as  
25 we sit here right now?

1           A.       I'm not too sure if he actually did it. I  
2 mean, I know there was more than one person involved,  
3 correct?

4           Q.       Uh-huh.

5           A.       Yeah.

6           Q.       Does that make a difference to you that there  
7 was more than one person involved?

8           A.       No.

9           Q.       Okay. But do you have any opinions as you sit  
10 here right now whether he's guilty or not?

11          A.       If he did it, yeah, I mean, if --

12          Q.       Do you have an opinion that he did or -- I  
13 guess I'm not following you.

14          A.       I'm sorry. Could you rephrase that?

15          Q.       I tell you what. I'll move on to something  
16 else. How is that?

17          A.       Okay.

18          Q.       Let me ask you this. We talked to quite a few  
19 people, a lot of people that are in favor of the death  
20 penalty. Probably not so many that have just, I guess,  
21 recently become in favor of the death penalty like you.

22                   But we talk, nevertheless, to quite a few  
23 people who are in favor of the death penalty and they tell  
24 us it's one thing to kind of, in their own personal life or  
25 outside the courtroom, be in favor of the death penalty or

1 think about a situation maybe where they could impose the  
2 death penalty, you know, maybe your situation with a close  
3 friend or family member, but they tell us it gets a little  
4 bit different when they get down here --

5 A. Uh-huh.

6 Q. -- because they are very close to being on a  
7 jury in a death penalty case. They know it's the State's  
8 goal that we're going to ask the jury to find him guilty and  
9 impose the death sentence.

10 A. Uh-huh.

11 Q. They get a chance to actually look at the  
12 person that's charged, knowing that the State is asking you  
13 to one day sentence that person to death. And they tell us  
14 that at that point it's different for them. It's no longer  
15 philosophical or in the abstract. It becomes very real.

16 A. Uh-huh.

17 Q. And it becomes almost a little too personal  
18 for them and they just don't feel like they are the type  
19 person that could participate in this process. And that's  
20 kind of what I hear you saying.

21 A. Okay.

22 Q. Am I right on that? Is that kind of what I  
23 hear?

24 A. Yeah.

25 Q. A little hesitation?

1 A. Yeah.

2 Q. Are you familiar with the method of execution  
3 in Texas?

4 A. Um, no.

5 Q. Okay. It's by lethal injection.

6 A. Okay.

7 Q. Does that ring a bell now that you have heard  
8 it?

9 A. Yeah, uh-huh.

10 Q. The procedures in every case are the same.  
11 They would be the same in this case.

12 A. Okay.

13 Q. If the jury sentenced him to death, answered  
14 these three questions in such a way that the Judge would  
15 have no discretion, he would be sentenced to death.

16 A. Okay.

17 Q. He would be immediately taken down to death  
18 row, which is in the Livingston Unit in southeast Texas. He  
19 would wait there. I can't tell you how long.

20 A. Yeah.

21 Q. But at some point in the future, Judge  
22 Cunningham would issue a date of execution.

23 A. Uh-huh.

24 Q. On that date he'd be moved from death row to  
25 downtown Huntsville to the main prison. That's where all

1 executions take place in Texas.

2 A. Okay.

3 Q. He would be kept in a small holding cell  
4 outside the death chamber. On his last day he would be  
5 given a chance to meet with friends, family members, a  
6 spiritual adviser. He would be offered a last meal, if he  
7 could eat it. As it got close to 6:00, 6:00 p.m., which is  
8 the time that the law mandates executions take place in  
9 Texas, he'd be moved from that holding cell a short distance  
10 down the hall to the death chamber.

11 A. Uh-huh.

12 Q. And that would be voluntarily or  
13 involuntarily. If he didn't want to go, there are guards  
14 there that are trained to make him go. And you may have  
15 seen a picture of the death chamber. It's a small room with  
16 a gurney on it and the gurney has leather straps.

17 A. Uh-huh.

18 Q. He would be taken in there voluntarily or  
19 involuntarily, strapped down to that table. An IV would be  
20 started in his arm with needles and tubes. There'd be  
21 people there to view the execution. Some from his side and  
22 some from the victim's side, the victim's friends and family  
23 members. The warden would give him a chance to make a last  
24 statement. He may admit his guilt and beg for forgiveness  
25 or he may not. He may proclaim and profess his innocence



1 and be very angry, defiant, about what is about to happen.

2 A. Uh-huh.

3 Q. But after he was given that chance to make  
4 that last statement, the warden would signal the  
5 executioner. The executioner would release lethal  
6 substances into that IV. They'd go in through his arm.  
7 Very shortly his lungs would stop, his heart would stop, and  
8 briefly he'd still be conscious. Eventually he would lose  
9 consciousness, go into a coma, and very shortly after that,  
10 die.

11 And I go through that not to be morbid  
12 with you, but those are the type details that are frequently  
13 reported in the paper. The death penalty is a reality in  
14 Texas. Texas juries give it and it's actually carried out.  
15 And you could expect one day, if you were on a jury that  
16 sentenced a person to death, that that execution would be  
17 carried out.

18 A lot of people are uncomfortable with  
19 that, like I said. They don't feel that they are the type  
20 person that could participate in that process because at  
21 this point, knowing what you know, and the things I've just  
22 described, it just becomes too personal for them and they're  
23 just too uncomfortable and couldn't do it. And that's kind  
24 of what I hear you saying; am I right?

25 A. Yeah. Yes, I'm sorry.

1 Q. Okay. It sounds like from what you are  
2 telling me, you are not the type person that could  
3 participate in this process?

4 A. Correct.

5 Q. Even though you may have recently become in  
6 favor of the death penalty, just in your own heart of hearts  
7 your beliefs would substantially impair you from being able  
8 to fully and fairly be a juror in a death penalty case; is  
9 that right?

10 A. Correct.

11 Q. Okay. Thank you for your honesty, ma'am. I  
12 appreciate it.

13 MR. WIRSKYE: Judge, that's all I have.  
14 I'll pass the juror.

15 MS. BUSBEE: I think we're reached an  
16 agreement on this juror, Your Honor.

17 THE COURT: Ms. Saucedo, we appreciate  
18 your time coming down here today, but the parties have  
19 agreed to excuse you, so you are free to go.

20 PROSPECTIVE JUROR: Okay. Thank you.

21 THE COURT: Thank you.

22 [Prospective juror out]

23 (Recess)

24 THE COURT: Mr. Simmons.

25 [Prospective juror in]

1 THE COURT: Good afternoon.

2 PROSPECTIVE JUROR: Good afternoon.

3 THE COURT: We have Mr. Brian Kevin  
4 Simmons, juror No. 4769. Welcome to the 283rd.

5 PROSPECTIVE JUROR: Thank you.

6 THE COURT: How are you doing?

7 PROSPECTIVE JUROR: Doing all right for a  
8 Thursday.

9 THE COURT: For a Thursday, a rainy  
10 Thursday. We appreciate you being here and did you have  
11 enough time to review the guide I provided for you?

12 PROSPECTIVE JUROR: Yes, sir, I did.

13 THE COURT: I also gave you a copy of  
14 your questionnaire so you can refer to that and begin to  
15 think about some of the issues once again. I know you  
16 probably haven't looked at it since May. This is an  
17 opportunity for you to ask questions and the attorneys will  
18 be visiting with you about the law and for you to get a  
19 really good functional understanding of how this process  
20 works.

21 At the end of the interview, I have two  
22 questions that I must ask. Number one is, do you understand  
23 the law? And, number two, can you follow the law? That's  
24 the big picture that I have to look at. The only question I  
25 have for you at this time is will you be able to serve this

1 Court for a period of two weeks beginning on November 10th?

2 PROSPECTIVE JUROR: Yes.

3 THE COURT: Thank you very much. With  
4 that, I'm showing Mr. Shook inquiring.

5 MR. SHOOK: Thank you, Judge.

6 BRIAN SIMMONS,

7 having been duly sworn, was examined and testified as  
8 follows:

9 DIRECT EXAMINATION

10 BY MR. SHOOK:

11 Q. Mr. Simmons, my name is Toby Shook. I'll be  
12 asking you questions on behalf of the State. As the Judge  
13 said, there aren't any right or wrong answers. We just want  
14 your honest opinions. We've learned a lot of information  
15 from the questionnaire and we thank you for taking the time  
16 to fill that out. It, believe it or not, shortens your  
17 time, actually.

18 I'll go over just a couple of things on  
19 it and then we'll talk about capital murder, some of the  
20 rules and laws that apply, and how you feel about that. You  
21 work at the -- what was the name of it? Associate --

22 A. Ascension Group Architects.

23 Q. Ascension Group Architects. What do you do  
24 with them on just a day-to-day basis?

25 A. I'm a project coordinator, which basically

1 means I'm in charge of pulling together information for the  
2 construction documents on hospitals.

3 Q. Okay. Okay. And you grew up in Texas and  
4 went to Texas A&M; is that right?

5 A. Yes, sir.

6 Q. Okay. This case involved some publicity. And  
7 I would say 99.9 percent of all the jurors on that big  
8 panel, obviously, saw some news coverage. It doesn't make  
9 you ineligible to be a juror. But we inquire as to every  
10 juror about what details they remember when they saw it on  
11 the news. What do you recall at this time?

12 A. The only thing I recall is what I just, you  
13 know, on the news reports. Generally, the night it happened  
14 and, basically, that some inmates had escaped from, I  
15 believe it was Huntsville, and came up to this area and were  
16 in the process of robbing an Oshman's Sporting Goods store  
17 when an Irving police officer came to stop them and in that  
18 altercation he was shot.

19 Q. Okay.

20 A. And then they were basically -- and then they  
21 basically fled.

22 Q. Okay. Did you remember recalling any of the  
23 subsequent court coverage or proceedings?

24 A. No. I didn't really give it that much of a  
25 mind, because I don't --

1 Q. Sounds like your knowledge is kind of very  
2 general, that sort of thing?

3 A. (Prospective juror nods head.)

4 Q. All right. That's about what it is with the  
5 other jurors. And, again, just because you have seen  
6 something on the news doesn't make you ineligible. If that  
7 were true, we couldn't seat a jury in high publicity cases.

8 We can't ask you to forget what you've  
9 seen, obviously. You can even form opinions on what you've  
10 seen. But as a juror, if you were chosen to sit on this  
11 jury, you'd have to be able to tell the Court that you could  
12 make your decisions just based solely on the witnesses and  
13 the evidence that was produced here in the courtroom, not on  
14 anything you've seen on the news.

15 You can't let that influence you in any  
16 way, because common sense will tell you the more accurate  
17 information will come from the courtroom itself. The news  
18 often gets things wrong. Their information isn't always  
19 accurate. Would you be able to follow that particular rule  
20 of law?

21 A. Yes, I would.

22 Q. Just make your decisions based on the  
23 witnesses here?

24 A. Yes.

25 Q. Okay. Let's talk a little bit about the death

1 penalty. You put on the questionnaire that you are in favor  
2 of it as a law. And I would like you to just kind of tell  
3 us why and what purpose you feel it serves.

4 A. I am in favor of the death penalty because I  
5 feel that somebody, you know, it's somebody -- it's not  
6 their right to take another person's life. And as a  
7 deterrent to that, the death penalty is -- it's the old  
8 adage, an eye for an eye.

9 Q. Okay. A lot of people feel that way. They  
10 think it's a just punishment for an extremely brutal crime,  
11 that sort of thing. Is it something you've believed in your  
12 whole adult life?

13 A. Yes, sir.

14 Q. Something you were brought up on, perhaps?

15 A. Yes, sir.

16 Q. Okay. In Texas, not every murder case is  
17 eligible for the possibility of the death penalty. We have  
18 -- in fact, most murders aren't. We have a lot of brutal  
19 murders where you could get a life sentence, but not the  
20 death penalty.

21 To go to the level of the death penalty,  
22 you have to have an intentional murder plus some other  
23 aggravating fact. And it can't be in self-defense,  
24 obviously. That's an absolute defense to a murder charge.  
25 And it's not an accident. It's an intentional killing with

1 another aggravated fact, such as a murder that occurs during  
2 the course of a felony.

3 If I go into a 7-Eleven and rob the clerk  
4 and shoot them, that could be a death penalty case. Go into  
5 someone's home, break into the home and murder someone in  
6 the home during the course of that burglary, that could be  
7 one, as well as murder during a rape, arson, or kidnapping.

8 In addition to that murder of specific  
9 individuals like a police officer on duty, fireman on duty,  
10 and prison guard on duty, or a child under the age of six.  
11 And then mass murder or a serial killer situation or more  
12 than one victim qualifies, and murder for hire, someone does  
13 it for money.

14 But those are generally the types of  
15 cases that come under this statute. Does that list make  
16 sense to you as the types of cases that should be  
17 considered?

18 A. Yes, sir.

19 Q. Then under our system not every person that's  
20 convicted of capital murder automatically gets a death  
21 sentence. It just depends on the facts of each case and the  
22 way the jury answers the questions. Some cases, after  
23 they're convicted, do result in a death penalty. Others  
24 result in a capital life sentence.

25 And, again, it's determined by each



1 individual set of facts for each particular case. Does that  
2 sound like a good system to have to you as far as each case  
3 being tried individually?

4 A. Yes, sir.

5 Q. Okay. Let me go into one other area. You  
6 know, when we talk about capital murder, we always envision  
7 a set of facts, generally. Usually it involves a person who  
8 is the actual triggerman, but sometimes more than one person  
9 can commit a crime. The common term for it is  
10 "accomplices." We call it the law of parties in Texas.

11 And if you do assist in committing a  
12 crime, you can be found guilty and be punished, even if  
13 someone who is also committing the crime has a greater role  
14 in it. Now, in a capital murder situation, you may have  
15 only one triggerman, but you may have some accomplices.

16 An example I give is a bank robbery. Say  
17 Mr. Wirskye and I decide we want to rob a bank. We get  
18 another friend to help us. He drives us there, is going to  
19 act as our getaway driver, our lookout. He keeps the car  
20 running right outside. He'll shout out if some danger comes  
21 along. Mr. Wirskye and I, we go in there. I've got a gun.  
22 I point it at the tellers, get their hands in the air, and  
23 then he starts ransacking the cash drawers.

24 At some point in time I intentionally  
25 murder one of the tellers. Maybe I don't like the way they

1 look or he tells me that one of them is going for the alarm.  
2 We escape, but we're caught soon afterwards.

3 Now, obviously, I could be prosecuted for  
4 the death penalty because I intentionally murdered someone.  
5 The law says, though, that because he and the other  
6 accomplice were actively participating in the crime, they  
7 could, also, be found guilty of capital murder and could  
8 ultimately receive the death penalty, depending on the  
9 facts, even though they didn't actually cause the death.

10 Some people have dispute with that. From  
11 their own personal feelings, they feel that -- they're fine  
12 with the death penalty for the actual triggerman, the  
13 murderer. But they don't think it's fair for an accomplice  
14 to get the death penalty, if they didn't actually cause the  
15 death themselves, maybe a long prison term, but not the  
16 death penalty.

17 Other jurors think it is fair that an  
18 accomplice could be prosecuted, could be found guilty of  
19 capital murder, and ultimately could receive the death  
20 penalty, depending on the facts and their involvement. But  
21 they think that's a fair concept.

22 And we ask each juror their gut reaction  
23 of that. How you personally feel about the prosecution of  
24 an accomplice in a death penalty situation?

25 A. I didn't actually know that that was the law,

1 and now that you've explained it, I can see that and I don't  
2 have a problem with an accomplice, because ultimately you  
3 are responsible for your own actions.

4 Q. All right. So you think it is fair that an  
5 accomplice could be prosecuted for the death penalty?

6 A. Yes.

7 Q. And could ultimately receive it, even though  
8 they didn't cause the death?

9 A. Yes.

10 Q. Why do you think that's a good, I guess,  
11 public policy or a good law to have?

12 A. I would think that it would be more of a  
13 deterrent that, you know, if you are in -- you know, just  
14 because you are with, you know, a large group of people,  
15 that you still are responsible as a group for the actions.

16 Q. Okay.

17 A. And as a deterrent, it would stop me.

18 Q. Okay. There's two ways we can prove that.  
19 Either if you are actively involved, directing, aiding,  
20 helping the crime to be committed. Also, under a conspiracy  
21 theory, Mr. Wirskye and I conspire to commit one crime, we  
22 agree to commit bank robbery in that example, and during the  
23 course of that, one of us commits another crime to further  
24 the conspiracy, in my example I murder someone, then  
25 everyone in the conspiracy can be found guilty, if the jury

1 believes from the facts that they should have anticipated  
2 that a death occur.

3 He doesn't even actually have the intent  
4 that a death occur, but from all the surrounding facts,  
5 common sense kind of point of view, he should have  
6 anticipated. Does that make sense to you?

7 A. Yes, sir.

8 Q. Okay. Now, are you familiar with the method  
9 of execution in Texas?

10 A. I believe it's lethal injection.

11 Q. That's right. The procedures are the same in  
12 each case. The trial is divided into two parts. There's  
13 the guilt/innocence stage. If we don't meet our burden of  
14 proof, it's a not guilty finding and we all go home. But if  
15 we do meet our burden of proof, the trial is not over.  
16 Again, it goes to the punishment phase where you can hear  
17 additional evidence and then you get these questions.

18 The questions, basically, ask is the  
19 defendant a continuing danger to society, did he intend the  
20 death of another human being, and is there sufficient  
21 mitigating evidence to warrant a life sentence? But if  
22 they're answered yes, yes, and no, the Judge has no choice  
23 but to sentence the defendant to death. Any other way is a  
24 life sentence, what we call a capital life sentence. But  
25 those are the two possible outcomes.

1                   If he were sentenced to death, he would  
2 be placed on death row and at some point in time the Judge  
3 would give him that date of execution. The methods and  
4 procedures are the same in each case. On the date of his  
5 execution he would be given time with a family member, a  
6 last meal. But at 6:00 p.m. all executions take place.

7                   He would be placed on a gurney. You've  
8 probably seen the photographs. Needles placed in his arm.  
9 Witnesses are brought in. After he gives a last statement,  
10 the chemicals are injected and they shut down his heart and  
11 lungs. It happens very quickly.

12                  But that's our goal in this case. We  
13 feel we have the type and quality of evidence to convince a  
14 jury of this man's guilt and that these questions should be  
15 answered in such a way that would result in his execution.

16                  You've told us from a philosophical point  
17 of view that you agree with the death penalty. You feel it  
18 should be prosecuted. Do you feel you are the type of  
19 person who, if you were placed on the jury and the State did  
20 prove these things to you beyond a reasonable doubt, you  
21 could actually take pen in hand and answer these questions?

22           A.       Yes, sir.

23           Q.       Okay. Let's talk about these Special Issues  
24 for a moment. If you would, just take one moment to read  
25 Special Issue No. 1.

1 A. (Prospective juror complies.)

2 Q. That question asks the jurors to make a  
3 prediction about how the defendant would behave in the  
4 future.

5 And as I went back before and told you  
6 that not everyone convicted of capital murder receives the  
7 death penalty. Our system sets up a situation where we have  
8 to convince a jury to answer these questions, and then that  
9 way some result in a life sentence and a death sentence, and  
10 it's just going to depend on the individual facts of the  
11 case.

12 As a juror you are required to wait and  
13 listen to all the evidence, get all the information in, and  
14 then look at these questions separately. Does that system  
15 make sense to you?

16 A. Yes, sir, it does.

17 Q. Okay. You, in your line of work, probably  
18 gather a lot of information. I knew when -- I went to  
19 school out at Tech, so there was a lot of architect people.  
20 And I knew -- lots of them were my buddies and, you know, I  
21 would go over and -- something I could never do, but you  
22 know how they put those big projects together, a lot of  
23 information going on. I remember them doing a whole lot of  
24 research on buildings, layout, and had eight million  
25 different drawings and views and that sort of thing. But

1 it's a kind of an information gathering field, obviously.

2 And that's kind of how this is. What it  
3 requires is jurors that have mental discipline to wait and  
4 listen to everything to come in and then analyze the  
5 information. There's no automatic answers to these  
6 questions. Just because you find someone guilty, you don't  
7 automatically answer yes, he's a continuing danger. There  
8 may be some situations where, yeah, the evidence will show  
9 he's a danger to society and he's a capital murderer. There  
10 may be some where you don't think he is.

11 You know, we give some strange examples  
12 to demonstrate that. You may have a situation, let's say,  
13 I'm living in a neighborhood and I believe someone -- I know  
14 someone molested my child. But the police won't do anything  
15 about it. Maybe he's the -- sometimes I make him the  
16 Mayor's son or something like that.

17 I'm mad about it, but I also don't want  
18 it to happen again. I wait a few days and I kick his door  
19 in and I kill him. That's capital murder. Now, if I'm  
20 tried, I could be convicted of capital murder because I  
21 murdered someone during a burglary.

22 But looking at all the facts and  
23 circumstances, a jury might not see me as a continuing  
24 danger in that situation, as opposed to someone who may have  
25 been to the penitentiary 20 times, something like that,

1 could be another situation. But you see how the individual  
2 facts change the answers to those questions?

3 A. Yes.

4 Q. Okay. Now, this question asks whether there's  
5 a probability the defendant would commit criminal acts of  
6 violence that would constitute a continuing threat to  
7 society. What types of things would you want to know before  
8 you answered that question?

9 A. Well, I would want to know prior, well, what  
10 he did prior to being incarcerated.

11 Q. Okay.

12 A. Which would lead to factors of just -- if it's  
13 petty burglary or, you know, stealing a car and joyriding,  
14 or was it, you know, assault.

15 Q. Okay.

16 A. It's just those types of actions.

17 Q. That type of background evidence is admissible  
18 at this point in the trial. If someone has been convicted  
19 you get to hear about that conviction, the sentence. You  
20 can even hear from the witnesses. You can hear good things  
21 and bad things. It's kind of "This Is Your Life." Then you  
22 also get to consider what the person's role in the crime was  
23 in the guilt/innocence stage.

24 But what you do is, just because you  
25 found him guilty, again, it's not an automatic yes answer.



1 The State has to prove that to you beyond a reasonable doubt  
2 by putting on the new evidence and then arguing what you  
3 have already heard. It goes all into that question. And  
4 then you'd have to answer it yes, if we prove it beyond a  
5 reasonable doubt. And if we don't, you'd leave it as a no  
6 answer.

7 Do you feel you could do that and require  
8 the State to prove that to you beyond a reasonable doubt?

9 A. Yes, sir.

10 Q. Could you wait for all the evidence to come in  
11 and then make your decision?

12 A. Yes, sir.

13 Q. And would you be able to follow the rule that  
14 it's not an automatic yes answer just because you found him  
15 guilty. You'd have to wait and listen to all the facts and  
16 then make that decision.

17 A. Yes, sir.

18 Q. Okay. Fair enough. Special Issue No. 2, you  
19 don't get to that unless you answer the first one yes. And  
20 then you look at that. It starts out with a no answer and  
21 we have to prove to you beyond a reasonable doubt it should  
22 be answered yes. Again, you can use the same evidence, what  
23 their role in the guilt/innocence stage was, and also any  
24 new information about their background that might help.

25 That question deals with that law of

1 parties or that accomplice situation we were talking about.  
2 The first part of the question asks whether the defendant  
3 actually caused the death of the deceased. If you believe  
4 he's the triggerman, let's say, the question is going to be  
5 answered for you.

6 But the second part of the question deals  
7 with that accomplice situation. If he didn't actually cause  
8 the death of the deceased, but intended to kill the deceased  
9 or another, or anticipated that a human life would be taken.  
10 So if he's just an accomplice, but you believe from all the  
11 evidence he intended the person to die or that he  
12 anticipated that a human life would be taken, you can answer  
13 that yes.

14 Now, in the guilt/innocence stage, what  
15 we have to prove is he should have anticipated. And here we  
16 go a little further and have to prove that he did  
17 anticipate. There's a difference there. It might be slight  
18 in your mind, but you have to be able to see that difference  
19 and apply it. Do you feel you could do that?

20 A. Yes, sir.

21 Q. Okay. One example we give sometimes is,  
22 Mr. Wirskye uses this example. When he was 16 his dad gave  
23 him a car. And being a 16 year old he drove it pretty fast  
24 around the neighborhood when his dad wasn't around, which  
25 resulted in him wrecking the car. His dad found out about

1 it and asked him how it happened and he told him and he  
2 jumped on him pretty good. And he may have used different  
3 language, but, basically what he said, you know, didn't you  
4 anticipate what was going to happen?

5 Well, being a 16 year old, he probably  
6 didn't. Now, if he were driving around, obviously, he not  
7 only should he have anticipated, he would have anticipated.  
8 A 16 year old may not in those situations. But that's the  
9 difference. And it may be the same evidence you heard in  
10 the guilt/innocence stage. You just have to look at it from  
11 this different angle and determine from everything you have  
12 heard about him, his role in the crime, as well as his  
13 background, did he actually anticipate that a death would  
14 occur?

15 If you believe that beyond a reasonable  
16 doubt, you can answer it yes. If you don't believe it, you  
17 can leave it as a no answer. Again, it's just going to  
18 depend on the particular facts. And the Judge requires the  
19 jurors to wait and listen to all the evidence that's in and  
20 then make this decision and look at the questions  
21 separately. Do you feel you could do that?

22 A. Yes, sir.

23 Q. And the State has the burden. You have to  
24 require us to prove that to you beyond a reasonable doubt.  
25 The defense doesn't have to prove. They are not under a

1 burden of proof to prove these things to you. You can  
2 anticipate, common sense will tell you, they will be arguing  
3 that way, and they may put on evidence. But you can't  
4 require them to. Your requirement must be on the State of  
5 Texas to prove that to you. And you feel that you could do  
6 that?

7 A. Yes, sir.

8 Q. This last question, the Special Issue, neither  
9 side has the burden of proof. It's what we call the  
10 mitigation question. It asks whether taking into  
11 consideration all the evidence, including the circumstances  
12 of the offense, and the defendant's character and  
13 background, and the personal moral culpability of the  
14 defendant, there is a sufficient mitigating circumstance or  
15 circumstances to warrant that a sentence of life  
16 imprisonment rather than a death sentence be imposed.

17 See how that question kind of covers  
18 everything? It's the last question you get to. You  
19 wouldn't answer it, unless you found him guilty, you believe  
20 he's a continuing danger, you believe he intended a death to  
21 occur. But it allows the jurors to show some mercy, if you  
22 think that's the right thing to do, if there's something in  
23 his background, something about his role in the crime, that  
24 tells you a life sentence is more deserving than a death  
25 sentence.

1 He doesn't get away with it. He has to  
2 serve a capital life sentence. But it's just something you  
3 make a decision based on your heart and your brain. You  
4 don't have to tell us what you think mitigating evidence  
5 would be. It's up to you and the other jurors. All you  
6 have to do is have the mental discipline to keep your mind  
7 open to it, look at the question, and determine which way it  
8 should be answered based on the evidence.

9 One way, there's a guy -- we were picking  
10 a case in east Texas and a juror, he kind of described it  
11 best, I thought. He looked at these questions like an open  
12 window being shut. You know, after we, if he was convinced  
13 that Special Issue No. 1 was yes, his window would be a  
14 little lower. Special Issue No. 2, a little lower. But it  
15 was still open to Special Issue No. 3 now. He said my  
16 window is not open a whole lot at that point, but it's still  
17 open. And if we convinced him that was a no answer, then  
18 that window would be closed. If we didn't, it would still  
19 be open. But that's the kind of metaphor he used.

20 These are -- another way we describe it  
21 is hurdles we have to get over before we can get to the  
22 death penalty. But as a juror you have to be able to keep  
23 your mind open to it. You don't have to tell us what it  
24 would be, because you don't know what it would be, you  
25 haven't heard any facts yet.

1           You can't assume the worst all the time.  
2       There may be something out there. And you have to be able  
3       to tell the Judge, I'll wait, I'll weigh it, and I'll answer  
4       it one way or the other, just depending on the individual  
5       facts. Do you feel you could do that?

6           A.       Yes, sir.

7           Q.       Okay. Do you think that's a good question to  
8       have in a death penalty situation?

9           A.       Yes, sir.

10          Q.       I mean, you may be dealing with someone who is  
11       guilty of capital murder and they may be dangerous, but  
12       there also might be something in their background which  
13       might tell you a life sentence would be the right thing to  
14       do in the case. It's just up to each juror and each case  
15       and the individual facts.

16                 Let's go over some of the rules that  
17       apply in this case, as well as any other criminal case. And  
18       these concepts will be pretty familiar to you because you  
19       learned these in school, I think, most of them.

20                 The presumption of innocence. Anyone  
21       charged with a crime is presumed to be innocent. They start  
22       out with that presumption. And the fact that he's been  
23       arrested or tried or going through this process is not  
24       evidence of his guilt. The evidence comes from the actual  
25       witnesses and we have to prove it.

1 Can you start out the defendant with that  
2 presumption of innocence and require us to prove our case  
3 beyond a reasonable doubt?

4 A. Yes, sir.

5 Q. Okay. The burden of proof, we kind of talked  
6 about this. It never leaves this table. It's on the State,  
7 the prosecutors, and it never shifts to the defense. You  
8 can't require them to prove his innocence, nor can you  
9 require them to prove any of these questions. Again, you  
10 might anticipate they would, but they're not required to  
11 under law. And you can never shift that burden of proof to  
12 them. It must stay here. Could you follow that rule of  
13 law?

14 A. Yes, sir.

15 Q. That burden of proof goes to each and every  
16 element of the indictment. We write the indictment. We  
17 have to prove it. If we fail on just one portion, then you  
18 are obligated under law to find the defendant not guilty.

19 An example of that would be the identity.  
20 We have to prove who committed this crime. At the close of  
21 the evidence, if you had a reasonable doubt about that,  
22 you'd find him not guilty. That's kind of an easy example I  
23 give.

24 To further demonstrate that, though, I  
25 like to give an example of the county where it happened. We

1 have to write in there what county, Dallas County. We're  
2 under the same obligation to prove to you beyond a  
3 reasonable doubt what county it occurred in as we are who  
4 committed the crime. If you had a reasonable doubt about  
5 the county, you would be obligated to find him not guilty.

6 Maybe it was one of those fact cases  
7 where it happened near the county line and, in fact, you  
8 believed the evidence showed it happened in Tarrant County.  
9 That would be a reasonable doubt, maybe on just one portion  
10 of the indictment, but still a reasonable doubt. And the  
11 law sees no difference in that.

12 That would be our fault. That would be  
13 poor preparation on our part. We could probably lose our  
14 jobs over that, but you can't help us out. A juror is kind  
15 of like an umpire at a baseball game. He has to call the  
16 balls and strikes as he sees them and he can't give us one,  
17 if he thinks we have failed in our burden.

18 Could you follow that rule of law and if  
19 we fail on our burden of proof on any element, find the  
20 defendant not guilty, if you have that reasonable doubt in  
21 your mind?

22 A. Yes, sir.

23 Q. Okay. The Fifth Amendment, just because --  
24 well, if someone is charged with a crime and they choose not  
25 to testify, you can't hold that against them. There could



1 be many reasons why a person may not want to testify. They  
2 may be very nervous in front of people and look guilty when  
3 they're not. They may be very poorly educated and not  
4 perform well, look guilty, again and not -- they may just be  
5 following the advice of their lawyer, who tells them not to  
6 testify. Or they may be real guilty and would look guilty,  
7 if cross-examined.

8 The law takes care of that by telling the  
9 jurors and instructing them that you can't hold that against  
10 them, if they choose not to testify. You have to make your  
11 decisions just based on the evidence that you have heard.  
12 Could you follow that rule of law?

13 A. Yes, sir.

14 Q. Okay. Oftentimes police officers testify in  
15 these criminal trials. Common sense will tell you that.  
16 You can't start a police officer ahead of any other witness.  
17 You have to judge them like any other witness. There are  
18 some good police officers, there are some poor police  
19 officers. And you have to wait until they take the witness  
20 stand and then judge their credibility. Could you do that?

21 A. Yes, sir.

22 Q. Okay. The burden of the -- a situation may or  
23 may not come up of a lesser included offense. Sometimes  
24 jurors find defendants guilty of lesser included offenses.  
25 In the situation such as a capital murder, that might be

1 aggravated robbery. The penalty range on aggravated robbery  
2 is a life sentence on one hand and all the way down to five  
3 years in prison and anywhere in between.

4 And, again, the law requires the jurors  
5 to have the mental discipline to keep their mind open. You  
6 weigh all the punishment evidence that comes in, good and  
7 bad, and then decide what to give. If it's a life sentence,  
8 they could do that, or if it's as little as five years in  
9 the penitentiary, they can do that, or anywhere in between,  
10 just what you think is the right thing to do based on the  
11 evidence.

12 Do you feel you could keep your mind to  
13 that full range of punishment, open to it, and assess either  
14 the minimum five, maximum life, or anything in between?

15 A. Yes, sir.

16 Q. Another law the Judge will probably instruct  
17 you on is the parole laws. You know, sometimes they are in  
18 the news. He can tell you and will tell you that if someone  
19 gets a capital life sentence, they have to serve 40 calendar  
20 years. They are not eligible for parole until then. But he  
21 would also tell you, you can't use the parole laws, you  
22 can't consider them in your deliberations. You must  
23 consider a life sentence, a life sentence. Could you do  
24 that?

25 A. Yes, sir.

1 Q. Okay. Again, it's just a matter of using  
2 mental discipline, waiting for all the facts to come in, and  
3 then making your decisions based on those facts. Sometimes  
4 it's going to result in a death sentence and sometimes it's  
5 going to result in a life sentence. But you have to just  
6 kind of let the cards fall where they may and answer the  
7 questions based on all the evidence you hear in both sides  
8 of the trial. And you feel you could do that?

9 A. Yes, sir.

10 Q. Okay. Well, I've done a lot of talking. Do  
11 you have any questions over anything we've gone over?

12 A. Well, actually, you answered my question in  
13 your last statement about the difference between a capital  
14 life sentence and a life sentence.

15 Q. A life sentence, let's say, for murder, the  
16 Judge would instruct you a defendant must stay in 30  
17 calendar years before they become eligible. A capital life  
18 sentence is even more. It's 40 calendar years. And even  
19 then they are not necessarily going to be paroled. That's  
20 the first time they can even be considered for it. So  
21 that's the main difference.

22 Capital life sentence is the longest  
23 sentence under our parole laws you can serve. And, again,  
24 the Judge would instruct you, you just must consider it a  
25 life sentence. And for all practical purposes, it is. Any

1 other questions over -- we've covered a whole bunch of  
2 stuff, I know.

3 A. Um, well, the admissible evidence, would it be  
4 the trial of the other, his accomplices, was that  
5 admissible?

6 Q. Anything relevant to the crime involving  
7 everyone involved, their roles in the immediate crime, can  
8 come in. A lot of that may come in in the immediate  
9 guilt/innocence stage as well as in the punishment stage,  
10 background evidence, if it involves the other accomplices.

11 Now, many times in punishment, though, a  
12 person's history might not involve the guilt/innocence stage  
13 at all. It's going to cover -- it could be going back to  
14 elementary school. I've seen trials where that's happened.  
15 But that type of evidence may come in. In fact, it may be  
16 the same, because if people commit a crime together, then,  
17 obviously, a lot of the evidence in the guilt/innocence  
18 stage would be the same. Any other questions?

19 A. No, sir.

20 Q. Okay. Well, those were good, insightful  
21 questions. I think you've got a good feel of the process.  
22 It's kind of a common sense deal, like I said, just waiting  
23 for the evidence to come and then make your decisions.

24 You sound like the kind of person that  
25 can do that, kind of coolly wait on the evidence, and then

1 decide if the State has proven its case. If they can, you  
2 don't have any hesitation finding in such a way that would  
3 result in a person's execution? But, also, if it's the  
4 other way, you don't have any hesitation that would result  
5 in a life sentence; is that right?

6 A. No, sir, I don't.

7 Q. You could do it either way?

8 A. Yes, sir.

9 Q. Okay. Fair enough. That's all the questions  
10 I have. I appreciate your patience with me.

11 A. Thank you.

12 CROSS-EXAMINATION

13 BY MS. BUSBEE:

14 Q. Sorry, Mr. Simmons, I've got all these stacks  
15 of things here, I lost track of it. Um, inquiring minds  
16 want to know what happened to your trip to Jamaica? Never  
17 mind.

18 A. Actually, um, it's interesting. That, the  
19 wedding was called off.

20 Q. I'm sorry.

21 A. So --

22 Q. Well, was that sometime ago? You filled this  
23 questionnaire out a long time ago.

24 A. It happened, roughly, probably two and a half  
25 months ago.

1 Q. Um, and it's not going to be any problem for  
2 you on your work to come down here, if you are selected?

3 A. No, ma'am.

4 Q. You nodded your head a lot because the State  
5 has to tell you a whole lot of things. Is there anything  
6 about this scheme that surprised you?

7 A. No, ma'am.

8 Q. Okay. And you understand that the way the law  
9 is written, a conviction for capital murder is an automatic  
10 life sentence?

11 A. Yes, ma'am.

12 Q. Does that seem like the right way to handle  
13 this?

14 A. Yes, ma'am.

15 Q. Okay. Sometimes people are so -- such  
16 advocates, I should say, of capital punishment that they  
17 think it should be a life, I mean, a death sentence and then  
18 maybe somehow convince the jury that it should be life  
19 instead. But you don't feel that way?

20 A. No, ma'am.

21 Q. You had asked whether or not evidence of what  
22 happened in other people's trial would be offered into  
23 evidence. What were you curious about?

24 A. Well, I was just -- that it just -- I'm trying  
25 to understand the -- you know, what the group was doing, if

1 any of that evidence was admissible in the trial.

2 Q. Well, actually, I think you know what comes  
3 out in these things is what everybody did. But you can see  
4 that they have to be tried individually. But I think just  
5 based on what I have seen before, the full picture would  
6 come out on each trial. Do you play ice hockey or just  
7 watch it?

8 A. I play and I coach developmental hockey.

9 Q. You coach what age group?

10 A. Ranging anywhere from probably sixth graders  
11 through high school.

12 Q. Seems like an injury prone sort of sport to  
13 me.

14 A. Um, well, the hockey that I play isn't. It's  
15 a beer league. There's no contact involved in that. I  
16 can't see a bunch of 32-year-old men slamming into each  
17 other. But the younger kids, it's a full-contact league.  
18 And I've seen two bodies going full speed run right into  
19 each other.

20 Q. See, I used to years ago date a guy whose son  
21 played hockey. And I thought the hockey dads were more  
22 dangerous than the kids. True?

23 A. True. The kids are usually out there to have  
24 fun.

25 Q. Yeah. Do you have any other comments to make

1 for us about service on this jury?

2 A. No, ma'am.

3 Q. Okay. Fair enough.

4 MS. BUSBEE: Those are all the questions  
5 I have, Your Honor.

6 THE COURT: Thank you, sir. If you would  
7 be so kind and wait for us outside and we'll have you back  
8 in just a few minutes.

9 [Prospective juror out]

10 THE COURT: What says the State?

11 MR. SHOOK: We have no challenges for  
12 cause.

13 THE COURT: Defense?

14 MS. BUSBEE: We have no challenge for  
15 cause.

16 THE COURT: Do you need a moment?

17 MS. BUSBEE: No, sir.

18 MR. SHOOK: We will accept the juror

19 MS. BUSBEE: We'll exercise a preemptory  
20 challenge on him.

21 THE COURT: No. 15. Will you kindly ask  
22 Mr. Simmons to come back in, please.

23 [Prospective juror in]

24 THE COURT: Mr. Simmons.

25 PROSPECTIVE JUROR: Yes, sir?



1 THE COURT: I appreciate your time and  
2 service to this Court and we have to inform you that you  
3 shall not be seated on this jury. So you don't have to  
4 worry about work. And thank you so much for coming down.

5 PROSPECTIVE JUROR: Thank you.

6 [Prospective juror out]

7 THE COURT: Five minutes.

8 (Recess)

9 THE COURT: Roger Allen Gordon.

10 [Prospective juror in]

11 THE COURT: Good afternoon, sir.

12 PROSPECTIVE JUROR: Hello.

13 THE COURT: We have juror No. 4778, Roger  
14 Allen Gordon. Mr. Gordon, welcome to the 283rd.

15 PROSPECTIVE JUROR: Thank you.

16 THE COURT: I see you brought a book.

17 PROSPECTIVE JUROR: Yeah, I didn't know.

18 THE COURT: You didn't know how much  
19 reading you would be able to get through.

20 PROSPECTIVE JUROR: Which was none.

21 THE COURT: I'm glad you read the guide.  
22 Did you understand everything I put in there?

23 PROSPECTIVE JUROR: Yes, uh-huh.

24 THE COURT: We're going to visit with you  
25 about that for a few minutes. The attorneys want you to ask

1 questions and have a functional understanding of the law.  
2 And this is the only time that you get to ask questions and  
3 we would like to inquire -- the attorneys may inquire  
4 further about the answers you provided in the questionnaire.  
5 That's why we give you a copy.

6 PROSPECTIVE JUROR: Right.

7 THE COURT: So if they say, would you  
8 look at this answer, what were you thinking-type issue, so  
9 this is as informal a process as we can have. Many people  
10 are nervous when they come in. And there are no wrong  
11 answers.

12 PROSPECTIVE JUROR: Okay.

13 THE COURT: I have two questions I need  
14 to ask at the end of the process. Number one, do you  
15 understand the law? Number two, can you follow the law?  
16 That's the big picture I've got. The only question I have  
17 for you at this time, sir, will you be able to serve this  
18 Court for a period of two weeks beginning on November 10th?

19 PROSPECTIVE JUROR: If I have to, yeah,  
20 I'll be here.

21 THE COURT: Yes, sir. Mr. Wirskye?

22 MR. WIRSKYE: May it please the Court?

23 ROGER GORDON,  
24 having been duly sworn, was examined and testified as  
25 follows:

DIRECT EXAMINATION

BY MR. WIRSKYE:

Q. Mr. Gordon, how are you this afternoon?

A. I'm doing fine.

Q. Okay. My name is Bill Wirskye. I'll be the Assistant DA that will be visiting with you for the next few minutes. What I'd like to do is follow up on some of the information in your questionnaire that you were kind enough to give us in that 17 pages, talk to you a little bit about your thoughts and feelings about the death penalty, and then, finally, talk to you about some of the law that applies in a case like this where the State is seeking the death penalty.

All kidding aside, would you be able to come down here and serve for two weeks? We know it's an imposition on everyone, but --

A. Yes, I believe that would be my duty. If called, I would be here.

Q. Okay. And it looks like you are a claims adjustor; is that right?

A. Actually, now I'm a team leader. I just got a promotion about three weeks ago.

Q. Oh, good. What does it mean to be a team leader or what's kind of a normal day for you?

A. Oh, I -- well, I supervise six people in our

1 office, five claims adjustors, one clerical employee, at  
2 Side's (phonetic) Auto Appraisals. It's a commercial  
3 casualty insurance claims office.

4 Q. Okay.

5 A. So, you know, I sign losses in the morning and  
6 review files, provide guidance to the adjusters, read mail,  
7 that type of thing.

8 Q. Okay. I know you indicated you work, I guess,  
9 pretty closely with attorneys, at least you're involved with  
10 some litigation or trial monitoring?

11 A. Yes, I have quite a few civil defense  
12 attorneys.

13 Q. And I'm always a little leery of people that  
14 just know civil litigation attorneys. I think both sides  
15 will agree they're a little bit different from the type of  
16 folks like us that just do criminal law.

17 A. I'm sure they are, yeah.

18 Q. I hope you won't hold that against us --

19 A. Oh, no.

20 Q. -- any past dealings you've had with those  
21 civil litigators. Let's see. And what do you do in your  
22 free time? It looks like you're a birdwatcher?

23 A. Well, backyard, yeah.

24 Q. Okay.

25 A. You know, I do my gardening and try to run

1 three or four times a week. I like to go hiking in national  
2 parks.

3 Q. Okay. Where do you go? What parks?

4 A. The last national park I went to was Crater  
5 Lake in Oregon. It was last summer. Then in, oh, I guess  
6 it was this summer, two years ago. This summer we were at  
7 the Buffalo River in Arkansas. Did some hiking there, hiked  
8 out to Whitaker Point.

9 Q. Have you been out to the Big Bend?

10 A. Yeah, I was there. I guess I was there last  
11 March.

12 Q. I always want to go there.

13 A. Got snowed on.

14 Q. Oh, really?

15 A. Yes, it was pretty -- I wasn't anticipating  
16 that.

17 Q. My dad and I have been saying for about five  
18 years we're going to, you know, take a few weeks off and go  
19 out there, but it seems like we just never have the time.  
20 You live in Irving; is that right?

21 A. Yes, that's correct.

22 Q. And I know you indicated, like everybody we  
23 talked to, that you've heard something about this case.

24 A. Oh, yeah, yeah.

25 Q. And, of course, I think you indicated you live

1 fairly close to --

2 A. That's correct.

3 Q. -- I guess, the crime scene. Just because you  
4 have heard about the case or live in that area, does not  
5 disqualify you as a juror. If that were the case, we'd  
6 never get a jury in high profile cases like this.

7 What the law is, is no matter what you  
8 have heard or, you know, even if you have formed some  
9 opinions or formed some impressions about the case, that's  
10 okay, as long as you can kind of set them aside, not  
11 necessarily forget about them, but just set them aside and  
12 be able to tell us that you can base your verdict on this  
13 case just on the evidence and the facts you hear in the  
14 courtroom.

15 A. Yes.

16 Q. Is that something you think you could do?

17 A. Yes.

18 Q. And I think the law recognizes, kind of a  
19 common sense, that the best source of any information is  
20 going to be what happens in court. You may be like me and  
21 be a little skeptical sometimes of what you see on the TV or  
22 read in the newspaper, that type thing.

23 A. Uh-huh.

24 Q. What do you remember hearing about this case?

25 A. Well, of course, I heard about it, I guess,

1 the night it happened or the next day on the TV. Recognized  
2 it's a couple of miles from my house, the Oshman's that I go  
3 to. Heard that it was a group of escapees. I don't  
4 remember the number, five or six, apparently were robbing  
5 the store and in the process shot Mr. Hawkins.

6 Q. Okay. Did you keep up with any of the events  
7 after the crime?

8 A. Not, not too much. You know, when they came  
9 up, you know, the trials and the verdicts. But I don't even  
10 know if I could, I don't know any of the, remember any of  
11 the names of the participants or anything like that, other  
12 than Mr. Hawkins.

13 Q. Okay. Are you aware of the verdicts in the  
14 other cases or --

15 A. Excuse me?

16 Q. Are you aware of the verdicts in the other  
17 cases?

18 A. Um, yeah, I think, seems like they were all  
19 guilty. I don't really -- if I remember correctly, that's  
20 what I remember.

21 Q. Okay. And any of that going to affect you,  
22 your ability to be fair and impartial in this case?

23 A. No, I don't believe so.

24 Q. Okay. And as I said, you know, we talk to a  
25 lot of people, some who know more than you, some who know

1 less, you know. It's okay even to have formed some opinions  
2 based on what you've heard, but as long as you can just kind  
3 of have that mental discipline to listen to the facts and  
4 evidence and just base your verdict on that, what happens in  
5 the courtroom, you would be qualified. And it sounds like  
6 you can do that. You told us generally you are in favor of  
7 the death penalty in some cases?

8 A. Yes, sir.

9 Q. Okay. And why is that? What purpose do you  
10 think it serves in our society?

11 A. Well, I just feel like there is some  
12 individuals that need to be removed from society for the  
13 acts they have committed or might commit in the future.

14 Q. Okay. When you think about those types of  
15 individuals or those type of crimes, what type people or  
16 what type crimes come to mind?

17 A. I would say murder, capital murder, child  
18 molesters, perhaps, of course, that would -- I think that  
19 would have to be under the circumstances.

20 Q. Okay.

21 A. That's -- I can't really think of any others.

22 Q. And we talk to a lot of people that feel the  
23 way you do. I think a lot of people are surprised. A lot  
24 of people think maybe the death penalty could be an option  
25 in cases that are not murders or in any murder cases. But



1 actually you probably got a chance to read the law in Texas.  
2 We just reserve the option of the death penalty only for  
3 murder cases and then only for a certain type of murder  
4 case, a certain subset of murders, that type thing.

5 I think a lot of people we talk to, if  
6 they were Governor for a day and could write the laws, would  
7 kind of expand that available list of crimes. But,  
8 nevertheless, that's the law we have. And is that something  
9 you think, knowing what the law is now, and knowing your  
10 personal views, that you could follow that law?

11 A. Yes, I believe I could.

12 Q. Look at those type of cases?

13 A. Yes.

14 Q. Capital murder is always a murder plus  
15 something else, is one way to think about it. If you kill a  
16 certain person, a child under six, a police officer,  
17 fireman, or prison guard on duty, if you commit an  
18 intentional murder during the course of another felony like  
19 a robbery, burglary, rape, that type of thing, that would be  
20 capital murder.

21 Murder for hire, if you hire somebody to  
22 kill your spouse or your business partner, mass murder,  
23 serial murder, those type things, those are the type of  
24 crimes in Texas that we reserve that option for the death  
25 penalty for. And I think a lot of people, again, I think

1 that's a surprise to some people when they get down there.

2 Because there are some very brutal, very  
3 heinous crimes that just don't qualify for the death  
4 penalty. You know, we can lock them up for life, give them  
5 a life sentence. But that death penalty is not an option.  
6 Does that make sense to you kind of how the law is in Texas?

7 A. Yes, yeah, it should be reserved for the most  
8 heinous crimes, I believe.

9 Q. And I think most people can generally agree on  
10 that. Let me ask you about another aspect of the law. It's  
11 what we call generally the law of accomplices. I think you  
12 probably are aware that any crime can be committed by more  
13 than just one person alone. There can be a group or a gang  
14 of people that commit crimes, whether it be shoplifting or  
15 whether it be capital murder. And the law says that we can  
16 prosecute everybody who's actively involved in a crime, even  
17 capital murder.

18 Scenarios that sometimes come up in the  
19 capital murder, we'll have a situation where maybe only one  
20 person, one of the people involved, pulls the trigger.

21 Maybe one person actually causes the death of the victim.  
22 The other people, the other accomplices, although they are  
23 actively involved, they didn't necessarily take that life.

24 Some people who are very strongly in  
25 favor of the death penalty, when faced with that scenario,

1 sometimes draw a line, and they would reserve the death  
2 penalty just for that person that pulled the trigger, the  
3 triggerman.

4 And if it were up to them, they'd take  
5 the death penalty option off the table for the nontriggermen  
6 accomplices. You know, they may want to lock them up for  
7 life. But for whatever reason, religious, moral, or  
8 ethical, they don't think a death penalty would be justified  
9 for those nontriggermen accomplices.

10 Other people kind of take a different  
11 view of that and say, you know, it really kind of depends on  
12 the facts, depends on the situation, the circumstances. I  
13 wouldn't just necessarily take that death penalty off the  
14 table. And we always ask everybody kind of where they come  
15 down on that issue when you're talking about the accomplices  
16 and the death penalty.

17 A. I would have to hear the evidence for each  
18 individual to really make that decision.

19 Q. Okay. So you --

20 A. I wouldn't take it off until I heard the  
21 evidence.

22 Q. Okay. So, you wouldn't just as a blanket rule  
23 automatically take that death penalty option off --

24 A. No.

25 Q. -- for a nontriggermen? Okay. And that's

1 pretty much what the law is, you know, based on the facts  
2 and circumstances of every case.

3 Just to give you kind of a hypothetical  
4 example to explain the law, let's say Mr. Shook and I, my  
5 partner, decide we're going to rob a bank. We get together  
6 and come up with the following plan. He's going to take our  
7 one pistol in and he's going to hold up the tellers in the  
8 bank, kind of hold them at bay. I'm going to go in unarmed  
9 with a bag. While he's holding everybody up, I'm going to  
10 clean out the cash drawers and we're going to make our  
11 getaway from the bank robbery.

12 Let's say we go to do that crime and when  
13 Mr. Shook has his gun out, for whatever reason, maybe one of  
14 them looks at him funny or maybe he sees -- or we see one of  
15 them going for a silent alarm to call the police, but for  
16 whatever reason he shoots and kills the teller. Okay?

17 He's committed an intentional murder in  
18 the course of a robbery, which is capital murder in Texas.  
19 He could be convicted of capital murder and potentially face  
20 the death penalty, depending on what the jury thinks. The  
21 law also says, depending on the facts and circumstances,  
22 that I could, too, the nontriggermen accomplice. What do  
23 you think about that type of scenario?

24 A. Well, if you were both involved in the  
25 planning and executing of the robbery, you would definitely

1 be an accomplice and, therefore, subjected to the penalty.

2 Q. Okay. You could see the death penalty for a  
3 person in my situation?

4 A. I think so.

5 Q. Okay. And that's basically what the law is.  
6 There's two different ways, I guess, to convict an  
7 accomplice of capital murder, such that they would face the  
8 death penalty. One is, in Texas, we call it the law of  
9 parties. I don't know why. Instead of an accomplice to an  
10 offense, we call a person a party to an offense.

11 But if I direct, solicit, encourage, or  
12 direct Mr. Shook to commit a capital murder, then obviously  
13 I could be found guilty of it. Or in our situation, if the  
14 jury thinks that we conspired together to commit that bank  
15 robbery and the jury feels that I should have anticipated  
16 that a life could be taken, then they could convict me of  
17 capital murder. Does that make sense to you?

18 A. Yes, it does.

19 Q. It's kind of a common sense rule. You know,  
20 you look at the accomplice. What should that person have  
21 anticipated? A lot of people think that somebody in my  
22 shoes should have anticipated that a death would happen,  
23 because we took a loaded gun to a bank robbery, that type  
24 thing. Is that pretty much where you are with respect to  
25 the law?

1 A. Yes, I believe that's true.

2 Q. Okay. Just generally, in Texas, capital  
3 murder trials or any criminal trials break down into two  
4 different phases or two different parts. The first phase we  
5 call the guilt/innocence phase. There the jury is just  
6 concerned with whether the person is guilty or not. Whether  
7 we proved to you beyond a reasonable doubt what we said in  
8 our indictment, the allegations in our indictment.  
9 Basically, is he guilty of capital murder or not?

10 If we prove that to you and you find the  
11 person guilty of capital murder, then you move into the  
12 second phase of the trial, which we call the punishment  
13 phase. The rules of evidence broaden out. You get to hear  
14 additional evidence about the person, his background,  
15 criminal history, good, bad, character, reputation type  
16 evidence, that type thing. And we let you listen to that  
17 evidence because we ask a jury to answer these three  
18 questions.

19 And we let the answers to these three  
20 questions determine the appropriate sentence in a case. We  
21 don't ask a jury at the end of the process to, you know,  
22 write in life sentence or write in death sentence. We ask  
23 them to work through these questions based on the evidence  
24 they've heard in both phases of the trial. And depending on  
25 the answers to these questions, that determines the

1 appropriate sentence, whether it's a life sentence or the  
2 death sentence. Does that kind of make sense to you in kind  
3 of a general way?

4 A. Yeah, uh-huh.

5 Q. And we'll talk about them more in just a  
6 second. But just in a nutshell, basically, that first  
7 question, do you think the person is going to be a future  
8 danger to society? You would answer it yes. The second  
9 question kind of deals with that accomplice scenario that  
10 we've talked about. If you think, you know, they actually  
11 pulled the trigger or intended or anticipated that a life  
12 would be taken, you'd answer that yes.

13 Then, finally, the third question is the  
14 mitigation question. Basically, it's a jury's chance to  
15 show mercy, if they feel like, you know, it's the right  
16 thing to do based on the facts. Is there anything  
17 mitigating in the case?

18 Now, if that question is answered no, you  
19 have a yes, yes, and a no, it's an automatic death sentence  
20 at that point. The Judge has no discretion, he will  
21 sentence the defendant to death. If the questions are  
22 answered any other way, he'll get that life sentence.

23 One way some people look at it is this.  
24 If a person is convicted of capital murder, they are sitting  
25 on that life sentence. The only way that you get to the

1 death penalty is if the State proves to you, you know, the  
2 first two answers should be yes and the juror feels there's  
3 nothing mitigating in the case. Then and only then do you  
4 get the death penalty. Does that kind of make sense to you?

5 A. Yes.

6 Q. Okay. Do you think that's a good system? You  
7 probably haven't been exposed to it before today, I'm sure.

8 A. Not criminal questions, no. I believe the  
9 system works fairly well.

10 Q. And you kind of get some structure to the  
11 process and, you know, we really rely on the jury to kind of  
12 keep that open mind and look at the facts, look at the  
13 evidence, and use their best judgment in answering those  
14 questions, and let the chips fall where they may, very  
15 basically.

16 Sometimes when we get people down here,  
17 some people who, I guess, philosophically or in the abstract  
18 are in favor of the death penalty, once they get down here  
19 in this point of the process, it gets a little more real to  
20 them. They are sitting in the courtroom. They're a few  
21 steps away from making the jury. They see a living,  
22 breathing human being defendant in the courtroom.

23 And, you know, very frankly, it's our  
24 goal in this case. We feel we have the quantity and the  
25 quality of evidence that's going to cause a jury to convict



1 him of capital murder, answer those questions in such a way  
2 that he will be sentenced to death and one day executed.

3 I think when you get to this point in the  
4 process, it kind of takes on a different feel for a lot of  
5 jurors. It's much more real. It's not so much abstract and  
6 philosophical anymore. Are you aware of our method of  
7 execution in Texas?

8 A. It's lethal injection.

9 Q. Exactly. Lethal injection. The procedures  
10 are the same in any case. They would be the same in this  
11 case. If he was sentenced to death, he'd be taken  
12 immediately to death row. In Texas it's the Livingston  
13 Unit. He would wait there some amount of time. I can't  
14 tell you how long, but at some point Judge Cunningham would  
15 issue a date of execution.

16 At that date he'd be moved from death row  
17 down to the main prison in Huntsville, Texas, where all  
18 executions take place. You may have seen a picture of it.  
19 It's where the death chamber is. He would be held in a  
20 small holding cell outside that death chamber for that day,  
21 be given a chance to meet with friends, family members, a  
22 spiritual advisor, be given an opportunity to eat a last  
23 meal, if he can.

24 As the time got closer to 6:00 p.m.,  
25 which is the time that's mandated that executions take place

1 in Texas, he'd be moved, you know, either willingly or  
2 against his will, into the death chamber. And you may have  
3 seen the picture of -- the media loves to show it, that  
4 gurney with the leather straps. He would be taken in there,  
5 strapped down to the gurney, a needle and an IV would be  
6 started in his arm.

7 There would be witnesses there from his  
8 side, witnesses there from the victim's side. He'd be given  
9 a chance to make a last statement. He may proclaim his  
10 innocence, be very defiant. He may beg for forgiveness and  
11 accept the blame for what he's done. But after that  
12 opportunity, the warden would signal the executioners and  
13 lethal substances would be released into the IV. Very  
14 quickly his heart and lungs would shut down, he'd lose  
15 consciousness, fall into a coma, and die very soon after  
16 that.

17 And I go into that detail, not to be  
18 morbid with you, but those are the type of details that are  
19 often reported in the media. You know, living here in Texas  
20 for a while, you probably know we're routinely among the  
21 leaders in executions of all the states. The death penalty  
22 is a reality here. Juries assess it. It's actually carried  
23 out.

24 If you were to serve on a jury where a  
25 death sentence was handed down, you can fully expect that

1 sentence to be carried out one day. And because we know  
2 this is not everyone's cup of tea, we always, at this point  
3 in the process, we want to make sure that jurors don't have  
4 any hesitation about participating as a juror in a death  
5 penalty case.

6 And only you can tell us. And we want to  
7 make sure that you feel you are the type of person who could  
8 take pen in hand and answer these questions in such a way  
9 that it may ultimately result in the execution of another  
10 human being. Do you think you're that type of person?

11 A. Yes. If the facts I felt warranted it, yes, I  
12 believe I am.

13 Q. Okay. Fair enough. Let's talk a little bit  
14 in detail about these Special Issues. If you could take  
15 just a moment or two and kind of read them. I know they  
16 were in the booklet, but they're phrased just a little bit  
17 differently up on the wall. And we'll talk about each of  
18 them in turn.

19 A. (Prospective juror complies.)

20 Q. Again, those are the three questions that are  
21 called Special Issues. They weren't drafted specifically  
22 for this case. The Legislature drafted them. So sometimes  
23 they are grammatically a little incorrect, I think, at some  
24 times.

25 But that first question, basically,

1 again, is the future danger question. It kind of asks a  
2 juror to make a prediction about the person's -- the  
3 probability of the person being a future danger to society.  
4 You see how it kind of asks a juror to make that prediction?

5 A. Yes, uh-huh.

6 Q. Okay. Is that something that you think you'd  
7 be comfortable doing, making that sort of prediction?

8 A. Yes, I would be.

9 Q. Okay. What type of evidence or what would you  
10 like to hear to help you make that type of decision?

11 A. Well, I'd need to know what his past history  
12 was.

13 Q. And that's what most people tell us, I guess.  
14 We've heard quite a bit that, you know, the best predictor  
15 of future behavior is past behavior, that type of thing.  
16 The answers to Special Issue No. 1 and Special Issue No. 2,  
17 as well, start off with a no answer. That's kind of a  
18 default setting for those two questions. And it's part of  
19 our burden of proof from the State to prove to you that  
20 those questions should be answered yes. Unless we prove  
21 that to you, the answer stays no. Does that kind of make  
22 sense to you?

23 A. Yes.

24 Q. Okay. And again, as I said, the law envisions  
25 or the law contemplates that even though you have convicted

1 someone of capital murder, that you'd be able to look at  
2 these questions with an open mind, with a fresh set of eyes,  
3 and kind of make an independent inquiry into each of these  
4 three questions.

5 And what I mean by that is this.  
6 Sometimes we have people tell us, you know, hey, if I've  
7 convicted someone of capital murder, I'm always going to  
8 think there's that probability that they're going to be a  
9 future danger. I've automatically answered that question.  
10 It just makes sense to me. I've kind of prejudged it.

11 And if they feel that way, that's fine.  
12 They simply wouldn't be a qualified juror, because, again,  
13 you never know what you are going to hear in that second  
14 phase of the trial or how it may affect the outcome to those  
15 questions. Does that make sense to you?

16 A. Uh-huh, yes.

17 Q. And, of course, you can go back and look at  
18 what you heard in the first part of the trial, along with  
19 what you hear in the second part to help you answer those  
20 questions. It may not take you long to answer that  
21 question. You may not have to think about it very long.  
22 But the point is, you have to be able to keep that open  
23 mind. Is that something you think you could do?

24 A. Yes, sir.

25 Q. Okay. Special Issue No. 2, again, starts off

1 with a no answer. We've got to prove it to you the answer  
2 should be yes. There's basically three parts to that  
3 question. If you think the defendant actually caused the  
4 death of the deceased, you know, if you think they were the  
5 triggerman, you'd answer it yes.

6 If you think they didn't actually cause  
7 the death of the deceased, but you think they intended that  
8 that person die, you'd answer it yes. Or, finally, that  
9 last line is kind of what we touched on already. If you  
10 think that even though they didn't have the intent that the  
11 person die, but they anticipated that a human life would be  
12 taken, you'd answer that question yes.

13 One important distinction to remember, if  
14 you'll recall, in order to convict an accomplice of capital  
15 murder, the standard is that the person should have  
16 anticipated that a life would be taken. When we get to the  
17 second phase of the trial, before you can get to the death  
18 penalty, the law says the standard is a little higher.  
19 Instead of should have anticipated, it's actually  
20 anticipated. You know, did the person in their mind  
21 anticipate that a life could be taken. You see that  
22 distinction between the two standards?

23 A. Yes.

24 Q. Between should have and did? And that's,  
25 basically, again, a little bit higher hurdle before we get

1 to the death penalty. But if you believe we have proven  
2 that to you beyond a reasonable doubt, you would answer that  
3 question yes. The final question, Special Issue No. 3, is a  
4 little bit different in that neither side has the burden of  
5 proof on this. Again, this is kind of the mitigation  
6 question. It's the last stop in the process.

7 We ask a juror to step back, take a deep  
8 breath, look at everything they've heard in both phases of  
9 the trial, the facts of the crime, the facts of the person,  
10 and what sort of personal moral blame the person bears for  
11 the crime. And taking all that into consideration, we ask a  
12 juror, you know, is there anything mitigating there?

13 And by mitigating we mean anything that  
14 lessens his personal moral blame. And if there is, is it  
15 sufficient that his life ought to be spared, that he should  
16 get that life sentence rather than a death sentence? Again,  
17 it's basically a jury's chance to show mercy at that point,  
18 even at that late point, if they feel the facts warrant it  
19 or justify it. Does that make sense to you?

20 A. Yes.

21 Q. Okay. Do you see the value in having that  
22 question, even that late in the process?

23 A. Well, yes, I'm sure there might be  
24 circumstances that you would want to take into consideration  
25 in this important of a decision.

1 Q. Exactly. And the law doesn't require you as  
2 you sit there now to think of anything. You don't have to  
3 consider any particular factor mitigating. We just leave it  
4 up to the good common sense of the jurors.

5 As long as you can tell us you'd have an  
6 open mind to that type of evidence, and if you heard it, you  
7 would weigh it one way or another, you would be qualified to  
8 serve as a juror. As long as you can tell us there's some  
9 value for you in that question, you would be qualified to  
10 serve. And it looks like to me you see the value in that  
11 third question?

12 A. Yes, I do.

13 Q. Okay. Again, I can't emphasize it enough, you  
14 know, just because you've found someone guilty, doesn't  
15 necessarily help you answer any of these questions  
16 automatically. Just because you have answered Special Issue  
17 1 a certain way, doesn't automatically lead you to another  
18 answer in Special Issue 2 or 3. Each is independent and we  
19 kind of require you to start with that open mind and work  
20 through it to the proper answer. Does that make sense to  
21 you?

22 A. Yes.

23 Q. Okay. Any sense about or any questions about  
24 this sentencing scheme that we have in Texas?

25 A. No.



1 Q. Okay. Is that something you're comfortable  
2 with, kind of the process, and how we --

3 A. You mean these questions?

4 Q. Yes, sir.

5 A. No. I don't have any questions about those.

6 Q. Okay. Give me just a second, Mr. Gordon. Mr.  
7 Gordon, thanks for your time. I appreciate it.

8 MR. WIRSKYE: Judge, I'll pass the juror.

9 CROSS-EXAMINATION

10 BY MS. BUSBEE:

11 Q. Thank you, sir. I just have a few questions  
12 myself. I know that this happened nearby your house. Did  
13 you know -- do you know any Irving police officers?

14 A. No, I don't.

15 Q. Okay. Well, of course, that's a good thing  
16 probably. Most people don't come into contact with police  
17 officers, except under negative situations. At the time  
18 that this happened, did you yourself or fear for yourself or  
19 your family from the people involved?

20 A. Well, initially, I mean, before they were  
21 caught, I guess there might have been a little fear when you  
22 first see a newsflash about something that is happening that  
23 close to your home, yeah, I would say, yeah. But it was  
24 very shortlived.

25 Q. And do you think that that would have any

1 effect in the back of your mind on deciding this case  
2 because it happened so close to your house?

3 A. I don't believe so.

4 Q. You know, you said a number of times something  
5 about, well, it would just really depend on the facts, I  
6 mean, having to do with whether or not a party in your mind,  
7 a party to an offense, which Mr. Wirsky explained ably,  
8 whether that person would be in your mind a candidate for  
9 the punishment of death. Could you elaborate on what you're  
10 thinking about when you say that?

11 A. Well, I don't know, I've not given it any  
12 thought, actually.

13 Q. I know, it's just that we tell you the law and  
14 then demand you tell us what you think about it.

15 A. Are you saying what type of circumstances  
16 would I think an accomplice --

17 Q. Just off the top of your head.

18 A. Um, I would say, you know, if he was with a  
19 group of folks or if he was an accomplice, not necessarily a  
20 group, if he had actually actively planned the situation and  
21 if, you know, anytime you're in a situation where you are  
22 committing a criminal act, when you have weapons, I think  
23 there is always a possibility that something wrong,  
24 something could go wrong, somebody could be injured or  
25 killed.

1 Q. Okay. In determining whether or not you would  
2 say, for instance, answer this Special Issue No. 2 or  
3 Special Issue No. 3, having really to go directly to the  
4 defendant, what the defendant thought in Special Issue No.  
5 2, or trying to determine if you want to grant some mercy in  
6 the case, would it be important to you, do you think you  
7 need to hear from the defendant in that case?

8 A. (No answer)

9 Q. And when I ask that, I want to make it clear  
10 to you the law says he doesn't have to testify.

11 A. Right. He didn't have to testify. I  
12 understand that.

13 Q. Some people say, man, I really would like to  
14 hear from him as a practical matter, Ms. Busbee, and that's  
15 the law.

16 A. I don't think I would have to hear from him.  
17 That would certainly be within his right to choose whether  
18 he wants to testify or not.

19 Q. Okay. Fair enough. Is there anything about  
20 this law that we've explained to you -- and I'm satisfied  
21 that you understand it and what not. Is there anything that  
22 you would like to comment on, that you'd change, if you were  
23 writing it?

24 A. No, huh-huh.

25 Q. So does this just kind of go along with the

1 way that you would be thinking, even before you knew what  
2 the law was?

3 A. I believe so, yes.

4 Q. Okay. Fair enough.

5 MS. BUSBEE: Your Honor, we have no more  
6 questions of this juror.

7 THE COURT: Thank you, sir. If you would  
8 be so kind as to wait for us out in the hall and I'll have  
9 you back in just a minute.

10 [Prospective juror out]

11 THE COURT: What says the State on juror  
12 No. 4778, Mr. Gordon?

13 MR. WIRSKYE: State has no challenge for  
14 cause.

15 MS. BUSBEE: Defense has no challenge for  
16 cause.

17 MR. WIRSKYE: State will accept the  
18 juror.

19 MS. BUSBEE: Your Honor, the defense has  
20 run out of the strikes that are granted us under the Code of  
21 Criminal Procedure in a capital case. I would exercise a  
22 peremptory challenge on this juror, if I could, based on his  
23 answers and demeanor on the witness stand. And I'm  
24 petitioning the Court to grant us additional peremptory  
25 challenges in order to do so and to form a fair jury to

1 effect the provisions of Article 1, Section 10, of the Texas  
2 Constitution, and the Sixth and Fourteenth Amendments of the  
3 United States Constitution, in that we had three challenges  
4 for 'cause that were denied by the Court, juror No. 1339,  
5 1643, and what I believe is going to be in the number system  
6 of the Court, Ms. Willis yesterday, juror No. 2511. And I  
7 would ask the Court for an additional strike in order to  
8 exercise it against -- Mr. Simmons? Mr. Gordon.

9 THE COURT: What page under the Code of  
10 Criminal Procedure allows me to provide you with additional  
11 strikes?

12 MS. BUSBEE: Is it Article 35.16? I  
13 don't know, Judge. I don't know that it's codified, Your  
14 Honor. I believe that it's constitutional. It's been -- it  
15 was granted. It's been granted in the past by courts. It's  
16 been granted in the past by this Court.

17 THE COURT: Mr. Sanchez, where are you on  
18 this issue?

19 MR. SANCHEZ: I'm on the same page as  
20 Ms. Busbee.

21 THE COURT: Ms. Busbee, you can look all  
22 day. It's not in that book. You are wishing me to rule  
23 under equity; is this correct?

24 MS. BUSBEE: Yes, Your Honor. Why are  
25 you torturing me like this? Yes, sir, in order to effect

1 due process and --

2 THE COURT: And just being fair to Mr.  
3 Murphy, because that's the bottom line.

4 MS. BUSBEE: In fairness, that we may  
5 have a fair jury in this case.

6 THE COURT: That's been my whole thread  
7 through the whole process, is to be fair to everybody.  
8 Defense 16 shall be granted.

9 [Prospective juror in]

10 THE COURT: Mr. Gordon, we want to thank  
11 you for your time. We appreciate you coming to court today.  
12 I'm sorry you didn't get time to read your book. But we are  
13 not going to seat you on this jury. You are excused. Thank  
14 you, sir.

15 PROSPECTIVE JUROR: Thank you.

16 THE COURT: We have one other matter to  
17 take care of today's docket. We've got juror 4738,  
18 Mr. Alton Boyce. Mr. Boyce was mailed a letter. He did not  
19 come back to the court. He has not responded to the  
20 Sheriff. Upon this information being made known to the  
21 Court yesterday, I directed the Sheriff to attempt  
22 contacting him and would you please state for the record  
23 your efforts to contact Mr. Boyce.

24 MS. DURON: Judge, I contacted Lancaster  
25 P.D. and talked to a sergeant that was willing to go out to

1 the residence, the address on the questionnaire, and he said  
2 that he would leave him some type of note or service to  
3 contact this Court immediately and what it would be in  
4 regards to, his appearing today.

5 THE COURT: And we've not yet heard from  
6 Mr. Boyce by letter or phone or person. Do the parties wish  
7 for me to issue a writ of attachment and have the Sheriff go  
8 out and sit up on the house and see if we can find  
9 Mr. Boyce?

10 MS. BUSBEE: Your Honor, I have reviewed  
11 his questionnaire and I am not going to be asking the Court  
12 for a writ of attachment.

13 THE COURT: You know I'll track them down  
14 on the other side of the earth like we did with that other  
15 gentleman that was in Albania.

16 MS. BUSBEE: Yes, Your Honor, but we  
17 don't request that. In fact, we request that you not do it.

18 THE COURT: State?

19 MR. SHOOK: No, Judge, we'll make no such  
20 request. We can agree to excuse the juror.

21 THE COURT: The parties have agreed to  
22 excuse Mr. Boyce. Mr. Boyce will be excused.

23 THE COURT: Monday morning?

24 MS. BUSBEE: Yes, sir.

25 [End of Volume]

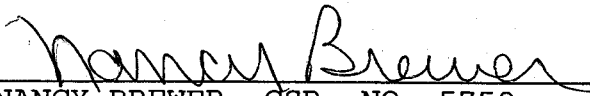
1 STATE OF TEXAS \*

2 COUNTY OF DALLAS \*

3 I, NANCY BREWER, Official Court Reporter for the 283rd  
4 Judicial District Court, do hereby certify that the above  
5 and foregoing constitutes a true and correct transcription  
6 of all portions of evidence and other proceedings requested  
7 in writing by counsel for the parties to be included in this  
8 volume of the Reporter's Record, in the above-styled and  
9 numbered cause, all of which occurred in open court or in  
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 2004.

13  
14  
15   
16 NANCY BREWER, CSR, NO. 5759  
17 Expiration Date: 12-31-04  
18 Official Reporter, 283rd JDC  
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REPORTER'S RECORD

VOLUME 35 OF 64 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS \* IN THE DISTRICT COURT  
VS. \* DALLAS COUNTY, TEXAS  
PATRICK HENRY MURPHY, JR. \* 283RD DISTRICT COURT

\*\*\*\*\*

INDIVIDUAL VOIR DIRE

\*\*\*\*\*

**FILED IN**  
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 13th day of October, 2003, the following  
proceedings came on to be heard in the above-entitled and  
numbered cause before the Honorable Vickers L. Cunningham,  
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

**ORIGINAL**

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PROSPECTIVE JUROR INDEX

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P R O C E E D I N G S

THE COURT: Mr. Martin.

[Prospective juror in]

THE COURT: Good morning, sir.

PROSPECTIVE JUROR: Good morning.

THE COURT: For the record we have juror No. 4993, Mr. Kenny Martin. Mr. Martin, welcome to the 283rd. Thank you for being here. I normally go through one drill and then the Sheriff was telling me you have some information that you would like to share with this Court after reading the guide that I provided for you.

PROSPECTIVE JUROR: Yes, I was not aware of this back in May, but something just came up and I'm to have surgery on November 13th and this is not elective surgery. It's surgery that I must have.

THE COURT: Well, I'm certainly aware you can't predict what your medical situation is going to be, and I appreciate you coming down here today. The parties have agreed to excuse you, so you can be worried about your health and not this trial. So we wish you the best and that's it for today. We'll let you go.

PROSPECTIVE JUROR: Okay. Thank you, Judge.

THE COURT: Thank you so much. Hope everything works out okay.

1 PROSPECTIVE JUROR: Thank you. I  
2 appreciate it.

3 [Prospective juror out]

4 THE COURT: Nathaniel Williams.

5 [Prospective juror in]

6 THE COURT: Good morning, sir.

7 PROSPECTIVE JUROR: Good morning, sir.

8 THE COURT: We've got juror No. 5013,  
9 Mr. Nathaniel Robert Williams; correct?

10 PROSPECTIVE JUROR: That's correct, yes,  
11 sir.

12 THE COURT: Mr. Williams, good morning.  
13 Welcome to the 283rd. Have you had an opportunity to read  
14 the guide I provided for you?

15 PROSPECTIVE JUROR: Yes, sir, I have.

16 THE COURT: I also gave you a copy of  
17 your questionnaire that you filled out back in May to help  
18 you begin to think about the issues that the attorneys are  
19 going to visit with you about.

20 It's a lot of law to give someone first  
21 thing on Monday morning. We understand that. You don't  
22 have to understand it all right now. That's what this  
23 opportunity is for you to visit with the attorneys and talk  
24 about these issues, get a good working knowledge and  
25 understanding of the law to be used in this case.

1                   At the end of the process I have two  
2                   questions that I must ask. Number one is, do you, in fact,  
3                   understand the law? Second, can you follow the law? Those  
4                   are the questions that I have to answer. First question I  
5                   have for you, sir, is will you be able to serve this Court  
6                   for a period of two weeks beginning on November 10th?

7                   PROSPECTIVE JUROR: Yes, sir, I would be.

8                   THE COURT: Thank you, sir. Mr. Shook,  
9                   would you like to inquire?

10                  MR. SHOOK: Thank you, Judge.

11                  NATHANIEL WILLIAMS,  
12                  having been duly sworn, was examined and testified as  
13                  follows:

14                  DIRECT EXAMINATION

15                  BY MR. SHOOK:

16                  Q.       Mr. Williams, my name is Toby Shook. I'll be  
17                  asking you questions on behalf of the State this morning.  
18                  If you have any questions of me, just feel free to ask, all  
19                  right?

20                  A.       All right, sir.

21                  Q.       We're just looking for your honest opinions,  
22                  as the Judge said. I'm going to go over a few things here  
23                  in your questionnaire and then talk about capital murder and  
24                  the death penalty, and how you feel about that.

25                  A.       All right, sir.

1 Q. I see you have been with Verizon for quite  
2 some time; is that right?

3 A. Yes, sir, almost 25 years.

4 Q. All right. Tell us what you do on just a  
5 day-to-day basis with them?

6 A. I'm a floor supervisor in a call center. We  
7 take customer telephone repair calls and then issue trouble  
8 reports that are sent to the field for action as  
9 appropriate.

10 Q. Okay. And it looked like on your  
11 questionnaire that you have lived in Dallas County for about  
12 the past ten years and lived in a lot of Texas cities.

13 A. Yes, sir.

14 Q. Have you moved around because of the company?

15 A. Partly because of the company. Also, I was in  
16 the Coast Guard for about 14 years before I joined Verizon.

17 Q. Oh. Okay.

18 A. And got introduced to Texas when I was in the  
19 Coast Guard.

20 Q. All right. So that's how you came to Texas,  
21 through the Coast Guard?

22 A. Yes, sir.

23 Q. All right. And you've been down on jury duty,  
24 but you've never served on a jury before?

25 A. Never even been close to jury duty, no, sir.

1 Q. Okay. Well, this jury duty selection is a  
2 little different from normal. Because it's a capital murder  
3 case, the law allows us to speak to every juror  
4 individually. And we found that it's a good way to get  
5 information from, and as I said before, if you have any  
6 questions at all, feel free to ask.

7 A. All right, sir.

8 Q. Obviously, you know from what the Judge has  
9 said and from the questionnaire, that this is a case in  
10 which the State is seeking the death penalty. So we speak  
11 to every juror for some length about how they feel about it  
12 as a law. On your questionnaire I believe you said that you  
13 favor the death penalty as a law and I'd like you to just  
14 kind of expand on that, tell us why you do, and the purpose  
15 you feel it serves society.

16 A. Right. The main reason I'm for the death  
17 penalty to a large extent is because it is one way to  
18 permanently remove certain individuals that really have no  
19 contribution to make to society based on their actions.

20 Q. Okay. What types of crimes do you feel the  
21 death penalty should be available for?

22 A. Basically, those where it takes a life of  
23 another human being under egregious circumstances. That  
24 sums it up.

25 Q. All right. If it were up to you, would you



1 ever have the death penalty for a crime other than murder or  
2 would you just reserve it for certain types of murder cases?

3 A. I can't think of anything else, except  
4 possibly treason.

5 Q. Okay. The way the law is set up in Texas is  
6 the death penalty is reserved only for murder cases and then  
7 only certain types of murder cases. For a murder case, you  
8 have to have an intentional murder that is unjustified, not  
9 in self-defense, not an accident.

10 But not every murder case is a death  
11 penalty case. In fact, the great majority aren't. We have  
12 a lot of brutal killings that wind up, what we just call for  
13 lack of a better word, regular murder cases. You can get 99  
14 years or a life sentence, but you couldn't receive the death  
15 penalty.

16 In order to qualify under that death  
17 penalty statute, they have to be intentional killings with  
18 some other aggravating facts, such as a murder that occurs  
19 during the course of a felony, for instance, robbery. If I  
20 go in and rob a 7-Eleven store, shoot the convenience clerk,  
21 that could be a death penalty case.

22 Murder during a burglary, someone breaks  
23 in a home, kills someone in the house, murder during a rape,  
24 during a kidnapping, or arson, murder of specific  
25 individuals like police officers or firemen on duty, murder

1 of a child under the age of six, could be a death penalty  
2 case. Mass murder or more than one victim, like a serial  
3 killer situation, murder for hire, if someone does it for  
4 money or profit.

5 But specifically those are the types of  
6 cases that have been reserved for consideration of the death  
7 penalty and then not every one of those cases will call for  
8 it. It all depends on the individual facts. The list I've  
9 gone over, is that the kind of the type of crimes from your  
10 own point of view that you feel could be, should be eligible  
11 for the death penalty?

12 A. Yes, sir.

13 Q. Okay.

14 A. I agree with that.

15 Q. Now, let me get into another area. When we  
16 think of capital murder, we always come up with examples in  
17 our mind and we usually think of the actual killer or the  
18 triggerman, we often say. I think that's just natural. But  
19 capital murder, like other crimes, sometimes is committed by  
20 more than one person. You have accomplices. People can be  
21 prosecuted, even if they are not the actual triggerman for  
22 capital murder.

23 An example I use is, let's say  
24 Mr. Wirskye and I decide we want to go rob a bank. We  
25 recruit another friend. He's going to be our getaway

1 driver. He's going to drive us there, he's got a fast car.  
2 He waits right outside, keeps the car running. He's going  
3 to yell out, if someone is coming. We run in while he's  
4 waiting outside for us. I've got a gun. I hold everyone  
5 up, get their hands in the air. And after I do that,  
6 Mr. Wirskye gets behind the counters and starts loading up  
7 all the money in a sack.

8                   During the middle of that robbery, for  
9 some reason, I intentionally murder one of the bank  
10 employees. Maybe I don't like the way one of them is  
11 looking at me or perhaps he warns me that one of them is  
12 going for an alarm, and I shoot them. We escape, but we are  
13 caught, let's say, a few blocks away.

14                   Now, obviously, in that example I could  
15 be arrested and prosecuted and even could receive the death  
16 penalty because I'm the actual triggerman. The law says,  
17 though, that people that assist, aid, help commit a crime as  
18 an accomplice can be also prosecuted for that same crime,  
19 and even under the law could receive the death penalty.  
20 Mr. Wirskye and that getaway driver could be prosecuted.

21                   One thing we like to do with each juror  
22 is ask your gut opinion about accomplices, because some  
23 people will tell us from their own personal point of view  
24 they feel the death penalty is appropriate, but they would  
25 only use it against people that actually murder the

1 individuals, the actual triggerman, or caused the death.

2 They think it's fair in those situations.

3           As far as an accomplice goes, they have a  
4 problem with that. They don't think it's fair to try to  
5 take their life when they didn't take a life. They might  
6 reserve a very lengthy prison sentence for an accomplice,  
7 but not a death penalty. Then other jurors from their  
8 personal point of view, do feel that it is fair to prosecute  
9 accomplices for the death penalty and for them to receive  
10 the death penalty, depending on the facts. But they agree  
11 and think that's a fair proposition.

12           But everyone feels differently. From  
13 your own personal point of view, your gut reaction to that,  
14 how do you feel about the prosecution of an accomplice in a  
15 death penalty situation?

16           A. Gut reaction, basically, has to do with what  
17 part as a facilitator that person may have played. I think  
18 you would really have to look at each individual issue  
19 involving that person. I would have some reservation, I  
20 think.

21           Q. Okay. What's important to you about the  
22 individual person or what types of factors come into play  
23 from your mind?

24           A. One of the things possibly would be, would  
25 that crime have been committed if that person declined to go

1 as a partner in the crime. It may, also, be to some extent  
2 what was the circumstances around the events that led up to  
3 the murder and, in a sense, I'd have to probably look at  
4 what part that person played and how important his role was  
5 to the entire event.

6 Q. Okay. If it was just a minor role, then you  
7 may not feel the death penalty is important?

8 A. I would say that would be accurate, yes. I  
9 may not feel he would be somebody I would want to give the  
10 death penalty to, if I were asked that.

11 Q. Okay. Then the opposite view, though, you do  
12 feel that some situations, the accomplice may be deserving  
13 of the death penalty?

14 A. Absolutely. Sometimes the accomplice may be  
15 the person that actually initiated the crime itself, and I  
16 would hold him as directly responsible.

17 Q. Okay. You certainly could have situations  
18 where maybe you'd have a boss that is determining things,  
19 and I think a lot of people would agree in those situations  
20 that might be a death penalty situation. But you, also,  
21 have situations where the accomplices are just there as a  
22 team working together. May or may not be the boss  
23 necessarily, but they have an important role.

24 From your personal point of view, do you  
25 feel the prosecution of accomplices should only be from

1 someone who is directing events or do you feel it could,  
2 also, be used for someone that's there just acting as part  
3 of the team?

4 A. I would say that the prosecution should,  
5 basically, be even across the board. I think they should  
6 present that as a capital crime. But I think it would be up  
7 to the individual circumstances to determine what the actual  
8 outcome would be for that individual.

9 Q. Okay. So you wouldn't take the death penalty  
10 off the table in an accomplice situation?

11 A. No, no.

12 Q. And you do feel that it is appropriate in  
13 certain situations. It's just going to come down to the  
14 facts?

15 A. Yes. Yes. Absolutely.

16 Q. All right. What the law says is the way we  
17 can prove that is one of two ways. If someone is actively  
18 involved, aids, directs, helps out, then they can be found  
19 guilty. The other is through the conspiracy law.

20 The law says that if more than one person  
21 conspired to commit one felony, in my example Mr. Wirskye,  
22 I, and the guy we got to be our driver, we all agreed to  
23 commit bank robbery. And, while in the course of committing  
24 that crime, one of us commits another felony to further the  
25 conspiracy, again, in my example, I shoot someone during our

1 robbery, then everyone involved in the conspiracy can be  
2 found guilty, even if they, the nonshooters, didn't have the  
3 specific intent for anyone to be murdered, if the jury  
4 believes from the facts that they should have anticipated  
5 that a death could occur.

6 So to get someone guilty of capital  
7 murder under that legal theory, the accomplices don't even  
8 have that intent that someone die if, from all the  
9 surrounding facts, though, the jury sees it as a situation  
10 where they should have anticipated that could occur.

11 How do you feel about that law? Do you  
12 think it's fair that someone could be found guilty when they  
13 didn't have the actual specific intent for someone to die?

14 A. Yes, I believe so. I think intent is  
15 something that when you, I think it has to do with free will  
16 to some extent. If you choose to do something that may  
17 result in harm to another individual, at some point you have  
18 to take that responsibility --

19 Q. Okay.

20 A. -- when something goes wrong. So in their  
21 eyes, it goes wrong.

22 Q. So getting back to the example I used, if you  
23 believe from the surrounding facts of those accomplices,  
24 even if they didn't have the specific intent to murder that  
25 individual, if they should have anticipated or, a lot of

1 people told us, should have known something like that could  
2 happen, you feel that it's fair for them to be found guilty  
3 of that particular crime?

4 A. I would say probably, yes. Again, I go back  
5 to what you learn about the circumstances leading up to it  
6 and whether the crime could have occurred, if they chose to  
7 participate and so on. But I think you'd have to really  
8 look at the scenario that was involved.

9 Q. Okay. And when you say the crime could have  
10 occurred if they did participate, do you mean -- what do you  
11 mean by that? That it couldn't have been pulled off without  
12 them, or --

13 A. Well, maybe just kind of an off-the-wall  
14 example, but using your example, let's say that you were  
15 unable to drive, period. And this gentleman offered to  
16 assist and drive. If he declined to do that, would the  
17 crime have occurred? No.

18 Q. Okay.

19 A. So I would hold him equally responsible.

20 Q. Okay. Okay. And I can't get into the  
21 specific facts, but we can tell you that that's the legal  
22 theory we are prosecuting this case under and seeking the  
23 death penalty, that of the accomplice rule, what we call the  
24 law of parties in Texas.

25 A. Okay.



1 Q. That you're a party to an offense. And from  
2 your personal point of view you don't have any objection to  
3 that?

4 A. No, sir, I don't.

5 Q. Okay. Now, this case generated a lot of  
6 publicity, as you well know, and, in fact, almost every  
7 juror, except one or two we've talked to, saw or read  
8 something about this case, which doesn't make you ineligible  
9 to be a juror. But, obviously, we want to inquire as to  
10 each juror what they remember seeing about the case and on  
11 the coverage, news coverage. What details do you recall at  
12 this time?

13 A. Looking back on it, I would say a lot of  
14 things are probably a little bit hazy, and there was a lot  
15 written about it. I would say that I recall the  
16 circumstances surrounding the death of Officer Hawkins, the  
17 capture in Colorado -- was it Colorado? See, I'm even a  
18 little bit -- I'm pretty sure it was Colorado.

19 Q. All right.

20 A. I saw a -- I don't want to call it a  
21 documentary, because what we see on TV oftentimes is a  
22 two-step version, you know, to make it interesting --

23 Q. Right.

24 A. -- that involved a case to some degree, but  
25 even that's a little fuzzy to some extent. It seems like

1 there was a couple that were captured separately from the  
2 main group that got away. That's about all that I remember,  
3 I guess.

4 Q. Did you follow any of the subsequent court  
5 proceedings after the arrests?

6 A. Not on any high interest level. I remember  
7 reading the results, I think, the outcome of a couple of the  
8 trials. I think it was the first one I remember, the first  
9 person. But I don't remember too much about the others.

10 Q. You don't remember the others? Okay. Like I  
11 said, almost everyone has read or heard something about it.  
12 The law says this. That doesn't make you ineligible to be a  
13 juror. If that were true, we couldn't ever seat a jury in a  
14 high publicity case.

15 What the law contemplates is, though,  
16 that jurors have to make their decisions based only on what  
17 they hear in the courtroom, because the best evidence,  
18 obviously, is going to come from the actual witnesses as  
19 they testify and the evidence that's introduced in court,  
20 and not in the news. As you, I think, accurately stated, a  
21 lot of times it gets juiced up or is inaccurate and that  
22 sort of thing.

23 We can't ask you to forget what you have  
24 seen or heard already because that would be impossible.  
25 What you have to be able to do as a juror is be able to tell

1 the Court that you will make your decisions, if seated on  
2 the jury just based on the evidence you hear, and you  
3 wouldn't be influenced by anything that you've already read  
4 or seen on TV. And it comes down to just what you are able  
5 to tell us, honestly, if you can do that. It comes down to  
6 each individual juror. We depend on your honest answers, if  
7 you feel you could follow that rule of law.

8 Do you feel that you could, if seated on  
9 this jury, make your decisions just based on what you hear  
10 in the courtroom?

11 A. Um, I probably feel like I could listen to the  
12 evidence and make the conclusions based on that. I do have  
13 a preconceived feeling of the guilt or innocence,  
14 unfortunately, but that's something I've felt through the  
15 media exposure and the other circumstances. But in all  
16 honesty, I would still feel like I could keep a reasonably  
17 open mind, if I had to serve.

18 Q. Well, it's -- it comes down to this,  
19 obviously. You can't be influenced by those things and  
20 you've seen a lot. But everyone who has been charged with a  
21 criminal offense does have that presumption of innocence at  
22 the beginning of trial. And the State must overcome that  
23 presumption by putting on the evidence.

24 And as a juror in this case, you'd have  
25 to be able to give that defendant that presumption of

1 innocence, presume him to be innocent and require us to  
2 prove beyond a reasonable doubt that he is guilty. In other  
3 words, you can't start him out as guilty and then see if we  
4 go along and put a little bit of evidence on. You can't do  
5 that.

6 If we, you know, fail in our burden of  
7 proof, you'd have to find him not guilty, no matter that you  
8 may have followed the case in the news and the media. But  
9 you have to be able to tell the Court that you could start  
10 him out with that presumption of innocence.

11 A. Right.

12 Q. Do you think you could do that?

13 A. I -- that's probably one of those things I've  
14 thought about ever since I filled out the questionnaire.  
15 But, yeah, the presumption of innocence, I think, is a  
16 critical element of giving the person a fair hearing. But  
17 at the same time, being a human being that I am, there was a  
18 lot of anguish on my part, because I really feel like my  
19 feeling at the moment is he's starting out presumed guilty  
20 in my heart.

21 Q. Okay.

22 A. But I don't know how to work around that too  
23 much. I know I could listen and possibly be somewhat  
24 objective, but at the same time I'd be starting out a little  
25 bit on the biased side, quite frankly.

1 Q. Okay. Bottom line is, you can't assure the  
2 Court 100 percent that you wouldn't be able to give him that  
3 presumption, just because of the amount of publicity you  
4 have seen?

5 A. Yes, sir.

6 Q. All right.

7 MR. SHOOK: All right, Judge. I believe  
8 that's all I have.

9 MS. BUSBEE: Your Honor, reluctantly and  
10 sadly, the parties have reached an agreement on this juror.

11 THE COURT: Mr. Williams.

12 PROSPECTIVE JUROR: Yes, sir.

13 THE COURT: I appreciate your honesty.  
14 You sound like you would be a real good juror in any other  
15 capital case, but you have, obviously, formed an opinion  
16 that is not fair to the defendant and I appreciate that.

17 PROSPECTIVE JUROR: I am a tainted  
18 person, I'm afraid to say. But I want to be honest about  
19 that.

20 THE COURT: Well, you could have sat  
21 there and not shared that with us and you had a real good  
22 chance of being on this jury, so I appreciate that. You can  
23 leave here understanding that you probably did more for jury  
24 service than you ever did by sitting in that box.

25 PROSPECTIVE JUROR: I appreciate that.

1 THE COURT: So you are free to go. Thank you  
2 so much.

3 PROSPECTIVE JUROR: Thank you, sir.  
4 Thank you.

5 [Prospective juror out]  
6 (Recess)

7 THE COURT: Ms. Crooks.

8 [Prospective juror in]

9 THE COURT: Good afternoon.

10 PROSPECTIVE JUROR: Good afternoon.

11 THE COURT: How are you doing?

12 PROSPECTIVE JUROR: Fine.

13 THE COURT: For the record we have juror  
14 No. 5095, Francile Crooks. Is that pronounced correctly?

15 PROSPECTIVE JUROR: Bad name, isn't it?

16 THE COURT: No. I just want to be sure  
17 it's pronounced correctly.

18 PROSPECTIVE JUROR: It's Crooks.

19 THE COURT: Ms. Crooks, have you had  
20 enough time this afternoon to read the orientation guide I  
21 provided for you?

22 PROSPECTIVE JUROR: Yes, sir.

23 THE COURT: I also gave you a copy of  
24 your questionnaire that you filled out for us back in May to  
25 help you begin to think about some of these issues. It's a

1 lot of law to give someone. And, please, you don't have to  
2 understand it all right now. That's what these interview  
3 sessions are for. The attorneys will go over the law with  
4 you, give you examples to help you have a working  
5 understanding of the laws that will have to do with this  
6 case.

7 The only thing I have for you at this  
8 time is will you be able to serve this Court for a period of  
9 two weeks beginning on November 10th?

10 PROSPECTIVE JUROR: If I'm chosen, I can  
11 be here.

12 THE COURT: Very good. I need you to be  
13 sure that you make a yes or no answer. What we were  
14 communicating, she has to write it down. That's her job.  
15 Everything we say she writes down. So if you would, please  
16 make a verbal response to the attorneys when they ask you  
17 questions. Fair enough?

18 PROSPECTIVE JUROR: Fair.

19 THE COURT: Great. Mr. Wirskye, would  
20 you like to inquire?

21 MR. WIRSKYE: May it please the Court?

22 FRANCILE CROOKS,  
23 having been duly sworn, was examined and testified as  
24 follows:

25 DIRECT EXAMINATION

1 BY MR. WIRSKYE:

2 Q. Ms. Crooks?

3 A. Yes, sir.

4 Q. How are you this afternoon?

5 A. Fine.

6 Q. My name is Bill Wirsky and I'll be the  
7 Assistant District Attorney that will be asking you  
8 questions for the next few minutes. What I'd like to do is  
9 follow up on some of the information in your questionnaire,  
10 and then get some of your thoughts and feelings about the  
11 death penalty, and then maybe talk a little bit about the  
12 law that applies in a case like this where the State is  
13 seeking the death penalty. Do you have any questions before  
14 we get started?

15 A. No, sir.

16 Q. Okay. Unless I misread you, you don't look  
17 very happy to be here.

18 A. I'm not happy to be here.

19 Q. Okay. Tell us why?

20 A. Well, I followed the trials of the rest of  
21 them in the court or in the papers.

22 Q. You know, we talk to quite a few people and  
23 that's one of the reasons we do it. These cases are a  
24 little bit unique in a sense that normally when a juror  
25 comes down, they know nothing about the cases. But we



1 talked to quite a few people that tell us that they followed  
2 the cases closely and know about the other verdicts and they  
3 just don't really think that, based on everything they know,  
4 they can be a fair juror in this type of case. They just  
5 know too much about it. If that's true, then we thank them  
6 for coming and send them out the front door. Is that kind  
7 of what I'm hearing from you, that you may know too much  
8 about it?

9 A. Well, I've read it, I've read it, and I've  
10 listened to it on TV from start to finish.

11 Q. Okay. And you are aware of the verdicts in  
12 the other cases?

13 A. Yes, sir.

14 Q. Okay. How do you think that might affect you  
15 in this case?

16 A. He's the last one. They all have guilty, so  
17 he's guilty to my way of thinking.

18 Q. Okay. And that's just an opinion you formed  
19 because you followed the cases so closely?

20 A. Yes.

21 Q. Okay. And based on that, you are probably not  
22 the right juror for this case; is that right?

23 A. I wouldn't think so, but --

24 Q. Okay. You already have an opinion about his  
25 guilt, right?

1 A. Yes, sir. All the rest of them were guilty.

2 Q. Okay.

3 MS. BUSBEE: I think we've reached an  
4 agreement, Your Honor.

5 MR. WIRSKYE: That's all I have, Judge.

6 THE COURT: Thank you, Ms. Crooks.

7 That's a pretty short voir dire.

8 PROSPECTIVE JUROR: That's the way I  
9 felt.

10 THE COURT: I appreciate it. We will  
11 excuse you. You are free to go.

12 [Prospective juror out]

13 THE COURT: Ms. Sims.

14 [Prospective juror in]

15 THE COURT: Good afternoon. Please have  
16 a seat.

17 PROSPECTIVE JUROR: Okay.

18 THE COURT: We've got juror No. 5156, Jan  
19 Rene Sims. Is that pronounced correctly?

20 PROSPECTIVE JUROR: That's correct.

21 THE COURT: Welcome to the 283rd.

22 PROSPECTIVE JUROR: Thank you.

23 THE COURT: Did you have enough time to  
24 read the orientation guide I provided for you?

25 PROSPECTIVE JUROR: Yes, sir.

1 THE COURT: Also a copy of the  
2 questionnaire?

3 PROSPECTIVE JUROR: Yes, sir.

4 THE COURT: Did you review that? Good.  
5 That's a lot of law to give someone. I don't expect you to  
6 understand it all right now. That's what this process will  
7 be about, is the attorneys will visit with you, help you  
8 understand how all this law relates, give you a good working  
9 foundation. Would you please ask questions?

10 PROSPECTIVE JUROR: Okay.

11 THE COURT: Believe me, the lawyers can  
12 make things that are very simple very complicated.

13 PROSPECTIVE JUROR: Okay.

14 THE COURT: All lawyers do. Anyway, ask  
15 questions. We want you to understand the law that you're  
16 going to be using.

17 PROSPECTIVE JUROR: Okay.

18 THE COURT: Fair enough?

19 PROSPECTIVE JUROR: Yes, sir.

20 THE COURT: At the end of the process, I  
21 have two questions I must ask. Number one is, do you, in  
22 fact, understand the law? Number two, can you follow the  
23 law? That's the big question.

24 The only thing I have to ask you now is  
25 will you be able to serve this Court for a period of two

1 weeks beginning on November 10th?

2 PROSPECTIVE JUROR: Yes, sir.

3 THE COURT: Very well. With that, I'll  
4 turn it over to Mr. Shook. You may inquire.

5 MR. SHOOK: Thank you, Judge.

6 JAN SIMS,

7 having been duly sworn, was examined and testified as  
8 follows:

9 DIRECT EXAMINATION

10 BY MR. SHOOK:

11 Q. Ms. Sims, my name is Toby Shook. I'll be  
12 asking questions on behalf of the State this afternoon.  
13 What I'm going to do is go over some of the information in  
14 your questionnaire --

15 A. Okay.

16 Q. -- and talk to you about capital murder and  
17 how you feel about that, and some of the other laws and  
18 rules that apply to these types of cases. And if you have  
19 any questions at any time, feel free to ask.

20 A. Okay.

21 Q. As the Judge said, there aren't any right or  
22 wrong answers. We just want your honest opinions. I think  
23 you've been on a couple of juries before?

24 A. Yes, sir.

25 Q. From that experience you know, then, this is a

1 little different procedure.

2 A. Yes, sir.

3 Q. It's a death penalty case, so the law has the  
4 procedure that we talk to each juror individually.

5 A. Okay.

6 Q. We don't mean to -- sometimes jurors feel like  
7 they're the ones on trial because we put them on a witness  
8 stand. We try not to make them feel that way, but we have  
9 found it is a pretty good procedure for getting information.

10 A. Okay.

11 Q. I see from the questionnaire that you grew up  
12 in Lubbock; is that right?

13 A. Yes, sir.

14 Q. I went to school out there so and enjoyed it  
15 quite a bit, but I never will forget the springs with all  
16 the duststorms.

17 A. Dust.

18 Q. And sometimes when the wind would blow, that  
19 certain aroma you would get from the stockyards.

20 A. Yes.

21 Q. I went back for one of the A&M games a while  
22 back and it just happened to blow in that one day, and I  
23 said, oh, I remember that. Looks like Lubbock has grown up  
24 quite a bit in the last few years. Have you been back  
25 lately?

1 A. I'm probably back about one to two times a  
2 year.

3 Q. Okay. I saw a lot of new construction there.

4 A. There is a lot of new construction, yes.

5 Q. In fact, they had a whole new area there at  
6 one end of town with all kinds of new restaurants and stuff  
7 that had been put in.

8 A. Probably on what, the loop? South of the  
9 loop?

10 Q. Uh-huh. Uh-huh. So it's growing up. From  
11 your questionnaire you said you were on two cases?

12 A. Yes, sir.

13 Q. What types of cases were those?

14 A. The first one was a civil case and it involved  
15 an individual who had injured other patron of the bar with a  
16 glass bottle and I believe that the -- they were wanting to  
17 know whether the bar would be liable for some of the  
18 damages.

19 Q. What happened with that case?

20 A. They decided that the bar was not held liable  
21 for the situation.

22 Q. Okay. And what was the other case? What did  
23 that involve?

24 A. The other one involved an individual who  
25 assaulted a truck driver. I believe that was actually a

1 criminal case.

2 Q. Okay.

3 A. At the market downtown early one morning.

4 Q. Okay.

5 A. And I believe that they actually decided -- we  
6 didn't ever -- well, I believe we found him guilty, as a  
7 matter of fact, yeah.

8 Q. Did the jury assess punishment in that case or  
9 do you recall?

10 A. No, sir. I don't recall.

11 Q. All right. How did those cases go as far as  
12 deliberations? Were they pretty smooth or were they real  
13 contentious, or --

14 A. No, they were really very smooth. The second  
15 one, in particular, was very quick and I think we made a  
16 verdict within 30 minutes.

17 Q. Oh, with the criminal trial?

18 A. Yes.

19 Q. Okay. Sometimes we talk to jurors and they  
20 just don't want to ever relive that experience, because it  
21 was such bad arguments and things like that. And then  
22 others --

23 A. The first one, there was some differing, you  
24 know, opinions. But within probably two hours we decided,  
25 you know, all together, that we agreed on an opinion.

1 Q. Okay. You work now for the, is it North Texas  
2 Women's Health Care Associates?

3 A. Yes, sir.

4 Q. What do you do with them on a day-to-day  
5 basis?

6 A. I'm a woman's health care nurse practitioner,  
7 so I provide primary health care to women.

8 Q. Okay. Is it a facility they have out there or  
9 --

10 A. It's -- well, actually, we're currently moving  
11 to Keller. It's an OB/GYN office. So we will be practicing  
12 in Keller and Grapevine.

13 Q. All right. And you have been in that field  
14 for what, some --

15 A. Since '96, which was about seven, eight years.

16 Q. Okay. I was looking at your work history.  
17 You started out at Parkland?

18 A. Yes, sir.

19 Q. What did you do at Parkland?

20 A. I was a labor and delivery nurse.

21 Q. Okay. Okay. You didn't work the emergency  
22 room or anything like that?

23 A. No. No.

24 Q. All right. And then next, was that a private  
25 practice?



1 A. Yes, sir.

2 Q. Okay. And then the -- then at UT Southwestern  
3 Medical Center?

4 A. Yes, that's where I practiced as a nurse  
5 practitioner.

6 Q. Okay. And then Planned Parenthood. What did  
7 you do with them exactly?

8 A. I was also a nurse practitioner there.

9 Q. Okay. And I had another -- I almost finished  
10 with your questionnaire. This, believe it or not, all this  
11 information saves you time.

12 A. Okay.

13 Q. We'd be actually, I guess, asking all this and  
14 it would take forever. But hobbies, I always -- we're  
15 always interested in a person's hobbies because that is  
16 something you choose to do.

17 A. Okay.

18 Q. You've got art, drawing. What type of art do  
19 you like?

20 A. Well, I'm a member of the Dallas Museum of Art  
21 and I just like to study art. I like to draw. I like to --  
22 you know, just pursue anything in the art field in general.

23 Q. Okay. Let me turn your attention now and ask  
24 you about capital murder. Obviously, you know from what the  
25 Judge told you in the questionnaire, that this is a case

1 seeking the death penalty. And we ask a lot of questions  
2 about the death penalty. You put on your questionnaire that  
3 you are in favor of it as a law?

4 A. Yes, sir.

5 Q. I'd like you to kind of tell us why you are,  
6 in your own words, and tell us what purpose you think it  
7 serves society.

8 A. Okay. Well, I think that in certain  
9 situations, if an individual has committed a murder, that  
10 that person should go before a jury of his peers and be  
11 assessed to whether they are still a member of the society  
12 that can function as a member without doing harm to others.  
13 And I think that in a situation where a person is found not  
14 to be able to be a part of the community, who would do harm  
15 to others, then that would be an appropriate assessment.

16 Q. All right. When you think of a death penalty  
17 case or at least a case for consideration of the death  
18 penalty, what types of crimes come to mind?

19 A. Murder.

20 Q. Is there any particular type of murder case?

21 A. One where there was intent.

22 Q. Okay. An intentional murder, that sort of  
23 thing?

24 A. Right.

25 Q. Okay. Any other crimes, other than murder or

1 where someone's life was taken would you ever consider?

2 A. Well, in the situation where a person is  
3 committing a crime and somebody is accidentally murdered,  
4 then I think it's appropriate to at least evaluate that  
5 person for that.

6 Q. I know one case you put on the questionnaire  
7 that you took an interest in, a lot of people did, was that  
8 case where the little girl was locked in that closet.

9 A. Uh-huh.

10 Q. Some people tell us sometimes severe child  
11 abuse cases like that, they may consider the death penalty.  
12 Have you ever thought about cases such as that?

13 A. Well, certainly if that little girl had died,  
14 I would definitely think that that was an appropriate thing.

15 Q. Have there been any other cases in the media,  
16 other than that one that you followed involving murder or  
17 severe crimes?

18 A. O. J. Simpson, that one comes to mind always.

19 Q. You couldn't get away from that one. What  
20 were your opinions about the O. J. case?

21 A. That -- well, it's, you know, it's hard to  
22 know not being a juror and not being there, so -- but in my  
23 opinion, he was probably guilty of the crime.

24 Q. Okay.

25 A. Obviously, the person that was responsible for

1 those two murders should have been held accountable.

2 Q. Okay. A lot of folks feel that way. In  
3 Texas, as far as the death penalty goes, and you have read  
4 the packet, it is reserved just for murder cases and then  
5 only certain types. There are a lot of murder cases that  
6 actually are pretty brutal, but you can't receive the death  
7 penalty, because they don't fall under this scheme.

8 First of all, you have to have an  
9 intentional killing. The intent may be formed in just a  
10 split second, but you have to have that specific intent.  
11 But you, also, have to have another aggravating factor, such  
12 as a murder in the course of a felony, such as a robbery.  
13 If I go into the 7-Eleven store and shoot the clerk during a  
14 robbery, that could be a death penalty case.

15 A. Uh-huh.

16 Q. A murder during a burglary, I break into  
17 someone's home and kill someone in the house. Murder during  
18 a kidnapping or rape, murder during an arson, an intentional  
19 killing, also, murder of specific individuals like a police  
20 officer on duty, fireman on duty, a prison guard on duty,  
21 and murder of a child under the age of six, murder of more  
22 than one victim, like a serial killer situation or a mass  
23 murder situation, spree killer, that could be the situation,  
24 or murder for profit like a hitman situation, doing it for  
25 money.

1                   But those are generally just the types of  
2 cases that have been reserved for consideration of the death  
3 penalty. As far as that list goes, is that -- from your  
4 personal point of view, do you agree with those cases?

5           A.       Yes, sir.

6           Q.       Let me go over another area which we call the  
7 law of parties, but I think it's more commonly known as  
8 accomplices. You know, more than one person can commit a  
9 crime and sometimes groups of people commit crimes. The law  
10 says that all those individuals, if they are actively  
11 participating in the event, can all be held accountable,  
12 even though some may have a greater role.

13                   And the same is true with capital murder.  
14 In fact, you may have one triggerman, but you may have other  
15 individuals helping commit the crime and they could be held  
16 accountable.

17                   Let me give you an example. The one I  
18 use is Mr. Wirskye and I and another individual, three of us  
19 get together and we decide we want to rob this bank. We  
20 plan it out. And what we're going to do is, I'm going to go  
21 in with a loaded gun. Mr. Wirskye is going to go in with a  
22 big bag. And the other individual is going to be our  
23 getaway driver. He'll pull up outside, keep his car  
24 running, look for trouble, warn us if it comes. But he'll  
25 keep it running, so we can get away quickly.

1 I take the loaded gun. I run in there.  
2 I point it. Everyone gets their hands up. Once I have them  
3 under control, Mr. Wirskye comes in and he starts loading  
4 the cash up. And then for some reason during the course of  
5 it, I intentionally murder someone in the bank, an employee.  
6 Maybe I don't like the way they're looking at me or he warns  
7 me that one is going for an alarm and I shoot them. We  
8 leave, we start to get away, but we're caught, let's say, a  
9 few blocks away.

10 Now, obviously, under that scenario, I  
11 could be prosecuted for the death penalty because I'm the  
12 triggerman. I caused the murder during a robbery. The law  
13 says, though, that Mr. Wirskye and the getaway driver could,  
14 also, be prosecuted for capital murder and, depending on the  
15 facts, even get the death penalty.

16 Now, we like to ask every juror how they  
17 feel and their gut reaction on the situation where an  
18 accomplice is prosecuted, because people feel differently.  
19 You have some folks that tell us, I, from a personal point  
20 of view, agree with the death penalty. I would, also, just  
21 reserve it for the triggerman or the person that causes that  
22 death. If an accomplice is involved, I might reserve a  
23 strong prison punishment for him, but I don't think it's  
24 fair to take a life, if they did not take one.

25 A. Uh-huh.

1 Q. You have other jurors who tell us, I'm for the  
2 death penalty against the triggerman, but I can also feel  
3 it's justified against an accomplice, also, depending on the  
4 facts. But I think it's just to be able to prosecute a man  
5 and even for them to receive the death penalty. People feel  
6 differently. There's no right or wrong answer, but we like  
7 to get your reaction, regardless of what the law is, on how  
8 you feel about that issue.

9 A. Well, I think that if the accomplice made the  
10 decision to go with the person who was going to carry a gun  
11 into a situation and that risk is already there, then that  
12 person should be held liable for the death penalty, too.

13 Q. Just like the triggerman?

14 A. Correct.

15 Q. And when you say that risk is there, do you  
16 mean the risk of him using it on someone?

17 A. Right.

18 Q. Okay. The law allows us to prosecute an  
19 accomplice in two ways. One theory is if they're actively  
20 involved and they are directing, aiding, or committing the  
21 offense, although they're not the triggerman, they can be  
22 found guilty. The other kind of has similar languages to  
23 what you brought out. It's called conspiracy.

24 If people conspire, like my example, the  
25 three of us, agree to commit bank robbery, and during the,

1 committing that crime, one of us commits another felony to  
2 further it, and in my case, me shooting the teller, then  
3 everyone involved in the crime can be found guilty, even if  
4 they didn't have that specific intent like Mr. Wirskye  
5 didn't have that specific intent to murder or the getaway  
6 driver, they can still be found guilty, if the jury believes  
7 they should have anticipated a death would occur.

8 A. Uh-huh.

9 Q. And you used the word that "risk" was there,  
10 but I think that's probably what you're saying.

11 A. That's exactly what I mean, yeah.

12 Q. From all the facts, if they should have  
13 anticipated a death could occur, then they can be found  
14 guilty. Now, they don't even have to have the specific  
15 intent that that person die. Now, to get to the death  
16 penalty we do have to prove that they did anticipate.

17 A. Uh-huh.

18 Q. And, again, it's just the surrounding facts.

19 A. Uh-huh.

20 Q. But from your personal point of view, you  
21 don't object to that, and I guess you would agree with the  
22 law that that should be a viable option for the State?

23 A. Yes, I'd agree.

24 Q. Okay. I can't get into the specific facts of  
25 our case or what I think the facts will show, but I can tell



1 you that that's the type of law we are prosecuting this case  
2 under, under the law of parties or this particular defendant  
3 as an accomplice.

4 A. Okay.

5 Q. You don't have a problem with that or sitting  
6 on a jury, if that's the type of case?

7 A. No, I don't.

8 Q. Okay. Now, in Texas, a trial is divided into  
9 two parts for a criminal case. There's the guilt/innocence  
10 stage and there's the punishment phase. And in a death  
11 penalty case, the jury decides the punishment. The trial  
12 you sat on, the judge may have. There's an option there  
13 that the jury or judge might. But in these cases the jury  
14 always decides punishment.

15 The guilt/innocence stage we have to  
16 prove the indictment to you beyond a reasonable doubt. If  
17 we fail to do that, obviously, we all go home with a not  
18 guilty finding. But if we do prove it to you, we then move  
19 to the punishment phase.

20 At that point in time you can get  
21 additional evidence and then you get these questions, which  
22 I'm going to go over more in detail in a minute, but  
23 basically the State has to prove to you that the defendant  
24 is a continuing danger to society, that he either caused the  
25 death or anticipated that a death would occur, and there's

1 not sufficient mitigating evidence to warrant a life  
2 sentence.

3 But if the questions are answered yes,  
4 yes, and no, then the Judge has no choice, he has no  
5 discretion. He would sentence the defendant to death. If  
6 they are answered any other way, again, he has no  
7 discretion, he would sentence the defendant to life. The  
8 jury doesn't write death or life, but that's the outcome.  
9 The Judge sentences just according to how they answer those  
10 questions.

11 A. Okay.

12 Q. But those are the only two possible outcomes.  
13 Is that clear to you?

14 A. Yes, sir.

15 Q. Are you familiar with the method of execution  
16 in Texas?

17 A. Injection.

18 Q. Right, lethal injection. You probably know,  
19 also, from growing up here in Texas, that it's a punishment  
20 that is actually carried out.

21 A. Yes, sir.

22 Q. Texas leads the nation in executions from all  
23 the states. You know, some states have it and don't enforce  
24 it, or they put people on death row and they rarely, rarely  
25 carry out executions for various reasons, but Texas does.

1           The procedures are the same in each case.  
2       They would be the same in this case in that, if the  
3       defendant were found guilty, those questions were answered  
4       yes, yes, and no, the Judge would sentence him to death and  
5       he would be placed on death row.

6           At some point in time, I couldn't tell  
7       you when, the Judge would actually give an actual date of  
8       execution. And the day prior to that date, he would be  
9       moved from death row and taken to downtown Huntsville where  
10      there's the Walls Unit, and that's where all executions take  
11      place by law. You may have seen it on the news. They  
12      sometimes have protests out there. There's a tower with a  
13      clock. I know I've seen it.

14           On the date of his execution, he's  
15      allowed time with family, friends, a minister. He's allowed  
16      a last meal, but at 6:00 p.m. the executions always take  
17      place. There would be witnesses there. There's a room for  
18      witnesses from the victim's side, as well as visitors and  
19      witnesses from the defendant's side in a different room.

20           Shortly before 6:00 p.m. the defendant  
21      would be taken into the execution chamber which, again, is  
22      often seen in photographs on the news, placed on a gurney,  
23      secured there by straps, needles placed in his arm which  
24      tubes go to another room where the executioner sits. Once  
25      the witnesses are brought in, he's given an opportunity for

1 a last statement and you may have read about these in the  
2 paper or heard about these on newscasts.

3 He can protest the death penalty, he may  
4 yell out for his innocence, he may ask for forgiveness for  
5 what he's done. But the press, obviously, likes to play  
6 that up quite a bit. You may read about that, if you were a  
7 juror in this case.

8 But after that statement is read, the  
9 warden simply signals the executioner, who then injects  
10 three different types of lethal substances which force the  
11 lungs to collapse, stops the heart, and he lapses into a  
12 coma. The process takes 10 to 15 seconds, the process you  
13 probably may be familiar with, obviously, with your  
14 background. It's quite mechanical when they apply it.

15 A. Uh-huh.

16 Q. And I don't mean to go into that in that much  
17 detail to be morbid, but, you know, it's one thing to talk  
18 about the death penalty in a philosophical sense, and  
19 another once you get on this panel and fill out a  
20 questionnaire and you are called down here and you realize  
21 you may be close to getting on a jury that makes those  
22 decisions, because everyone feels differently about the  
23 death penalty.

24 We have some folks that are against it on  
25 grounds and they can't serve and that's fine. We send them

1 on. We have other people that are really too much biased  
2 for it. We have others that are for it and feel they can  
3 make the decision. And we have others that are for it  
4 philosophically, but are bothered by it, don't feel they  
5 could make that decision.

6 A. Uh-huh.

7 Q. We can't preview the facts. All we can do is  
8 ask you from your own personal point of view, as best you  
9 know yourself, do you feel you are the type of person that  
10 if you sat on this type of jury and these things were proven  
11 to you, that you could make that decision? You could take  
12 pen in hand and answer the questions in a way, knowing that  
13 the defendant here would be executed someday?

14 A. I think that I could make the decision. I  
15 think it would be with a great deal of thought, though.

16 Q. Okay. It wouldn't be something, I guess, you  
17 would want to do?

18 A. I wouldn't take it lightly, no.

19 Q. Most jurors don't. In fact, the ones that do,  
20 we usually send on their way. But you do feel, as best you  
21 know yourself, you could make that decision?

22 A. Yes.

23 Q. Okay. And would you be able to make that  
24 decision, again, in a situation in which the State were  
25 prosecuting the defendant in an accomplice situation?

1 A. Yes, sir.

2 Q. Okay. We just kind of go into that detail,  
3 because we want to know and let folks reflect. But you seem  
4 like the type of person that has thought about it, knows  
5 yourself pretty well, and you are pretty confident you could  
6 do that, then?

7 A. Yes, sir.

8 Q. Okay. Anytime I get someone kind of from your  
9 background, we always ask, because you've been in an  
10 occupation that helps people --

11 A. Correct.

12 Q. -- especially from the medical profession.

13 A. Uh-huh.

14 Q. And sometimes people of your background do  
15 have some objections to that. But they usually let us know  
16 that way ahead of time.

17 A. Yeah.

18 Q. But that's not your situation?

19 A. Well, again, I would not take a decision like  
20 that lightly. It's not something that would -- I think in a  
21 situation like that, you really have to separate your  
22 emotions from the decision you are making. So that's  
23 something that would have to be done.

24 Q. Okay. Now, this case generated quite a bit of  
25 publicity when it occurred and most of the jurors recall

1 seeing something about it in the radio or television or in  
2 the newspaper, which doesn't make you ineligible to be a  
3 juror. But we always inquire as to what you recall about  
4 the facts.

5 A. I just vaguely remember the case. I remember  
6 the person who was killed was named Aubrey Hawkins. I  
7 remember seeing news reports. I remember seeing his mother  
8 on TV. I remember the defendants, I believe, had broken out  
9 of jail and there was a nationwide hunt.

10 Q. Okay. Do you remember anything about the  
11 arrests?

12 A. No, I don't.

13 Q. Anything about any subsequent court  
14 proceedings, anything like that?

15 A. No, sir.

16 Q. Okay. Did you have any strong reaction to any  
17 of that when it occurred, seeing the mother on TV or the  
18 incident itself?

19 A. No more so than I would on any other news  
20 report.

21 Q. Okay. Again, just because you have seen  
22 something on the media, doesn't mean you are ineligible.  
23 What the rule comes down to is this. If you are seated on  
24 the jury, you have to make your decisions just on what you  
25 hear in the courtroom from the witness stand, either the

1 witnesses or the evidence introduced.

2 We can't ask you to forget what you have  
3 seen, obviously, but we can ask you and what you have to be  
4 able to promise the Court you can do, is make your decisions  
5 just based on the evidence. In other words, you can't let  
6 what you have already seen influence you in any way. Do you  
7 feel you could do that?

8 A. Yes, sir.

9 Q. Okay. Let's talk for a minute, then, about  
10 these Special Issues and I'd like you to just take a moment  
11 to read Special Issue No. 1 to yourself.

12 A. (Prospective juror complies.)

13 Q. Question No. 1 asks the jurors to make a  
14 prediction about the defendant, how they are going to behave  
15 in the future.

16 A. Uh-huh.

17 Q. Do you feel that you can make that kind of  
18 prediction, if you're given enough facts?

19 A. Yes, sir.

20 Q. What types of things would you want to know  
21 before you answered that question?

22 A. What the person's history is, had he ever  
23 committed another crime before?

24 Q. Okay. Would that kind of show you a pattern,  
25 that sort of thing?



1 A. Yes, sir.

2 Q. Okay. Any other information you think would  
3 be valuable to you?

4 A. I guess the mental status of the person  
5 involved.

6 Q. Okay. You mentioned such as, I know in the  
7 questionnaire, severely mentally retarded individuals would,  
8 obviously, cause a factor in it.

9 A. Uh-huh.

10 Q. And, in fact, I can tell you, severely  
11 mentally retarded folks can't be prosecuted for the death  
12 penalty now. So that probably won't be an issue. You may  
13 have some people that are less educated, or slow, but that  
14 level I think you are talking about, that probably wouldn't  
15 be an issue.

16 A. Okay.

17 Q Well, you are right about background. In this  
18 portion of the trial, the punishment stage, if that type of  
19 evidence exists, it is admissible. If someone has committed  
20 a prior crime, you can even hear from the witnesses, if they  
21 are available. You can hear about the type of sentence they  
22 received, that sort of thing. You can also hear good things  
23 about that individual. It's kind of good and bad, all their  
24 background growing up.

25 You, also, obviously, get to reconsider

1 the evidence of the crime itself and their role in the  
2 crime, because you don't get to this question, unless you  
3 found the defendant guilty.

4 A. Okay.

5 Q. Under the law that question starts out with a  
6 no answer, and the State has to prove to you beyond a  
7 reasonable doubt it should be answered yes.

8 A. Okay.

9 Q. Again, by you considering the evidence you  
10 already heard and, also, by additional evidence you hear in  
11 the punishment stage. The words you see there, you're not  
12 going to get legal definitions in that portion of the trial,  
13 at least not on these questions. So the words and their  
14 meaning will be left up to you and the other jurors.

15 So we talk to everyone, how they view  
16 that, some of the language. We have to prove in that  
17 question whether there's a probability the defendant would  
18 commit criminal acts of violence. What does "probability"  
19 mean to you?

20 A. That the person would be likely to commit the  
21 crime again.

22 Q. Okay. Obviously, we don't have to prove a  
23 certainty, because I don't think anything can be proved to a  
24 certainty. And we have to go more than a possibility,  
25 obviously, because if it was as low as possibility, anything

1 would be possible.

2 A. Uh-huh.

3 Q. We have to prove he would commit "criminal  
4 acts of violence." When you see that in terms of that  
5 question, what types of acts or crimes do you -- come to  
6 mind?

7 A. Criminal acts of violence would be involving  
8 something where he injured another individual or killed  
9 another individual.

10 Q. Okay. And then, finally, constituting a  
11 continuing threat to society. What does "society" mean to  
12 you?

13 A. The community that we live in.

14 Q. Okay. Could it be anyone and everyone the  
15 individual comes in contact with?

16 A. Yes.

17 Q. Including people in the prison system?

18 A. Yes.

19 Q. Okay. Do you feel that question No. 1 has a  
20 lot to do with a person's, I guess, mind, how they, their  
21 intent, that their mind is dangerous or not? In other  
22 words, they have the potential to act out, if they are given  
23 that opportunity?

24 A. Yeah, or their will.

25 Q. Okay. And, again, I guess from one of your

1 answers you feel a lot of that could be discovered, if you  
2 see a continuing pattern and that sort of thing?

3 A. Correct.

4 Q. All that evidence can be used. And what the  
5 law requires is that there's no automatic answers. In other  
6 words, just because you found someone guilty, doesn't mean  
7 that would be a yes. You have to wait, reevaluate the  
8 evidence, look at anything new, and then decide if it should  
9 be answered yes. Do you feel you could do that?

10 A. Yes, sir.

11 Q. All right. Let's look at question No. 2 and  
12 just take a moment to read that to yourself.

13 A. Okay.

14 Q. This is that question that has to do with that  
15 law of parties or the accomplice situation. It also starts  
16 out with a no answer and you use the evidence in the  
17 guilt/innocence stage, as well as any new background  
18 evidence you hear about the individual, to make this  
19 decision.

20 It covers -- well, the first part of the  
21 question asks whether the defendant actually caused the  
22 death of the deceased. If you think they are the actual,  
23 let's say, triggerman, or caused the death, obviously, the  
24 question is answered that way.

25 But the rest of the question covers that

1 accomplice situation we've gone over. That is, if they  
2 didn't actually cause the death of the deceased, but  
3 intended to kill the deceased or another. So if they had  
4 that intent or they anticipated that a human life would be  
5 taken, you would answer that question yes.

6 Now, as you recall in the guilt/innocence  
7 stage, we have to prove or the facts would show that they  
8 should have anticipated. And here we see language that they  
9 did anticipate, so there's a difference there.

10 A. Okay.

11 Q. What that difference is, is kind of up to you  
12 and the other jurors. You just have to be able to see a  
13 difference and view the question that way. Do you feel you  
14 could do that?

15 A. Yes, sir.

16 Q. Again, it kind of goes back to what you said  
17 in the fact situation we were looking at and what you  
18 thought was important about accomplices. If there was a  
19 risk there that a life could be taken, you felt that, yes,  
20 the death penalty could apply.

21 We can't stop and open a person's mind  
22 and show you what their intent was, obviously. All we can  
23 do is put on all the relevant evidence, show you what their  
24 role is, maybe from independent witnesses, maybe from other  
25 sources, and you can draw inferences what a person's intent

1 is. You can use your common sense.

2 A. Uh-huh.

3 Q. We call making, sometimes we say, using  
4 reasonable deductions.

5 A. Uh-huh.

6 Q. Basically, it's just using your common sense  
7 to determine what a person's intent is from their actions  
8 and all the surrounding facts. Do you feel you could do  
9 that?

10 A. Yes.

11 Q. That's something you probably do in your  
12 everyday life, determining a person's intent, and nothing  
13 different here with all that, you know. What kinds of  
14 things do you think would be important about determining a  
15 person's intent in this --

16 A. I didn't hear what you said.

17 Q. What do you think would be important to you or  
18 what could be potentially important in determining a  
19 person's intent in these situations?

20 A. Repeat the question one more time.

21 Q. Any ideas about what you might view as types  
22 of factors would be important to you in determining a  
23 person's intent in the situation of question No. 2? I know  
24 we talked about if the risks were there.

25 A. Well, I think if the person decided to put

1 himself in that place at that time with those individuals,  
2 that would be something that I would want to know.

3 Q. Okay. If it was a voluntary act?

4 A. Right.

5 Q. How involved they were with the other  
6 individuals? How well he knew the other individuals, that  
7 sort of thing?

8 A. Yes.

9 Q. Okay.

10 A. Or the reason why he was there in the first  
11 place.

12 Q. Okay. Sure. That would go a lot to their  
13 intent. You know, sometimes we have jurors tell us, well, I  
14 would like to know if they had a meeting ahead of time.

15 A. Uh-huh.

16 Q. Which I guess everybody would, but usually the  
17 State is not called to those meetings, so we usually can't  
18 produce that type of evidence. And that's why we rely on  
19 inferring intent from actions. And you feel comfortable  
20 doing that?

21 A. Uh-huh.

22 Q. Okay. Now, this last question is a little  
23 different. We don't have the burden of proof. It can,  
24 neither side has the burden of proof, actually, and it  
25 allows the jurors to look at everything. If you'd just take

1 a moment to read that question to yourself. That question  
2 gets kind of lengthy.

3 A. (Prospective juror complies.) Yes.

4 Q. And I should have told you beforehand, I  
5 always like to kind of give everyone notice that we didn't  
6 get together and write these questions out. The Legislature  
7 did. Because that one, I read it a thousand times and it  
8 still gets me confused sometimes. But it has the jury --  
9 the jury doesn't get to it, unless you have already found  
10 the guy guilty, found that he's a continuing threat, and  
11 found that he either caused the death or had that intention  
12 or that anticipation.

13 But it does allow a jury to look at a  
14 person's background and their role in the crime, and if you  
15 think that a life sentence should be served rather than a  
16 death sentence, you can answer the question that way, if you  
17 think there is sufficient mitigating evidence. He doesn't  
18 walk free, obviously. He has to serve this life sentence.

19 What mitigating evidence is, is going to  
20 be up to you. I can't tell you what it's going to be and  
21 the Court is not going to tell you what it's going to be.  
22 It's up to you and the other jurors.

23 A. Okay.

24 Q. You don't even have to tell us what you think  
25 mitigating evidence is. You just have to be able to promise



1 the Court you can keep your mind open to it.

2 A. Uh-huh.

3 Q. As you sit here today, though, we like to  
4 always get a gut reaction. Can you think of anything as you  
5 sit there that you might view as potentially mitigating  
6 evidence? Or types of evidence you might view as  
7 potentially mitigating?

8 A. Well, when you say mitigating, do you mean  
9 evidence that would cause me to change my opinion about the  
10 death penalty?

11 Q. Yes. Evidence that would cause you to say,  
12 well, I know this person is dangerous, but I think maybe a  
13 life sentence --

14 A. Would be more appropriate.

15 Q. -- would be the right thing to do in this  
16 case.

17 A. If the person was found not to have any choice  
18 in where he was or who he was associating with or that type  
19 thing, in other words, if he was not there by his own free  
20 will.

21 Q. Okay. That's a point a lot of jurors have  
22 brought up and I should have gone over this ahead of time.  
23 If a person is not there by his own free will, then that  
24 might be a defense, actually.

25 And in that case it wouldn't be

1 mitigating, because we probably would, if that were the real  
2 fact situation, we probably wouldn't have gotten a guilty,  
3 because if it could actually have been proven on a juror's  
4 mind they believe they were there by coercion, such as a  
5 hostage situation, then there probably wouldn't be a guilty.  
6 That would be a defense, so that would actually be a  
7 different situation. But other jurors have told us, maybe  
8 if the person had a lesser, you know, maybe --

9 A. Background.

10 Q. You brought up mitigating as far as  
11 substantially mental retardation. You may not have that  
12 far, but you may have someone who is a lot slower --

13 A. Uh-huh.

14 Q. -- and not as actively involved, and that  
15 might be a situation.

16 A. Mitigating, I see.

17 Q. But, again, you are not required to think of  
18 it. In fact, most jurors tell us they can't. They actually  
19 don't sit around thinking about these situations, at least  
20 we hope they don't. Background does come up, obviously.

21 A. Uh-huh.

22 Q. And, again, jurors don't have to agree.  
23 Sometimes in these cases you hear about the way a person was  
24 raised, maybe they came from a poor background or a broken  
25 home. Maybe they were physically abused, mentally abused,

1 maybe both, could be severe.

2 We've had -- some jurors will tell us,  
3 you know, abuse like that I might view as potentially  
4 mitigating, if it's severe. We have other jurors say, I  
5 feel really bad for that person. But once you are an adult,  
6 you have to make decisions and there are certainly plenty of  
7 people that come from a bad background and they don't commit  
8 capital murder. But there's no right or wrong answer. Do  
9 you have any opinions about that type of background?

10 A. I don't think that that would sway the -- I  
11 don't think that would be mitigating.

12 Q. Okay. A lot of people tell us that, because  
13 there have been so many examples of people overcoming that.  
14 But, again, it's just -- depends on what it is. You know,  
15 it may be something the State shows you, maybe something the  
16 defense shows you.

17 But wherever it comes, you have to be  
18 able to keep your mind open to it and if you think it rises  
19 to that level of mitigation, you can answer it so that a  
20 person's life would be spared. It allows you to show some  
21 mercy.

22 A. Okay.

23 Q. Do you feel you can keep your mind open to  
24 that type --

25 A. Yes.

1 Q. And give a yes answer if you thought that was  
2 the right thing to do?

3 A. Absolutely.

4 Q. Okay. Vice-versa, if you thought that there  
5 wasn't sufficient mitigating evidence, would you be able to  
6 answer no, knowing when you did that, it would be a death  
7 sentence?

8 A. Yes.

9 Q. Okay. Fair enough then. You feel like you  
10 could keep your mind open to it and give it fair weight?

11 A. Yes.

12 Q. Okay. Sometimes in the punishment phase you  
13 hear from experts. Sometimes the defense calls them,  
14 sometimes the State even calls them. These experts are  
15 usually psychologists, psychiatrists. They can give  
16 opinions about whether they think someone is a future  
17 danger. They may give opinions about mitigation. Maybe  
18 they specialize in that or they will have opinions about why  
19 a person acts a certain way because of their background.

20 Some jurors give a whole lot of weight to  
21 those experts. They really think they have a lot of value  
22 and would really follow their advice. We have other jurors  
23 that really don't put a whole lot of stock in it. They feel  
24 you could probably, they call it, I think the term is a  
25 "soft science" --

1 A. Uh-huh.

2 Q. Feel if you looked hard enough or had enough  
3 money, you could find someone that would render an opinion  
4 one way. And then we have other jurors that would just look  
5 at that like any other witness, not necessarily give them  
6 greater weight or less weight, but just another piece of the  
7 puzzle.

8 A. Uh-huh.

9 Q. How do you feel about those types of experts?

10 A. I think I would fall into that third category  
11 you described. You know, certainly, if you've got a person  
12 who's dealt with these situations or what he -- is an  
13 educated person in his area, his opinion is something that's  
14 going to be important, but I don't think that it's  
15 necessarily going to sway you one way or the other.

16 Q. Have you had much dealings with these types of  
17 experts in your field?

18 A. I've known people who served as expert  
19 witnesses.

20 Q. What types of expert witnesses were they?

21 A. Medical doctors.

22 Q. Okay. But not psychologists or --

23 A. No.

24 Q. Okay. Do you also feel that there could be  
25 some people in these fields that they just -- they make a

1 living doing this and --

2 A. Yes.

3 Q. And make a good profit from it and you  
4 wouldn't value as much?

5 A. Right. You'd consider their motivation.

6 Q. Just going to depend on the individual  
7 witness?

8 A. Yes.

9 Q. Okay. That's kind of what the law conceives  
10 jurors to do, keep their mind open to it. Obviously, you  
11 can have your opinions one way or the other, but you feel  
12 you can keep your mind open to that, as well as any other  
13 evidence?

14 A. Yes.

15 Q. Okay. The whole idea, I guess, is you would  
16 be able to keep your mind open to all these issues, wait for  
17 all the evidence to come in, and then make sure the State  
18 has proven the first two to you beyond a reasonable doubt,  
19 and then fully look at the last issue and can answer it yes  
20 or no, just based on the evidence?

21 A. Yes.

22 Q. Do you feel you could do that?

23 A. Yes.

24 Q. All right. Do you have any questions over  
25 anything we've gone over?

1 A. I don't think I do.

2 Q. Okay. I went over it pretty quick, but you  
3 followed it very well. Is there anything -- one question we  
4 like to ask at the end is if is there anything we may have  
5 missed that you think would be important for the parties,  
6 we'd want to know about you, if you were sitting here on  
7 either side of the table?

8 A. Um, no, sir.

9 Q. We covered it pretty good here in the  
10 questionnaire, I know, so.

11 A. It's been thorough, yes.

12 Q. Let me go over one other area. These apply to  
13 all criminal cases and you will be familiar with these  
14 because you have sat on a criminal trial before.  
15 Presumption of innocence. Just because someone has been  
16 arrested or we're going through this process is not evidence  
17 of their guilt. A jury must start out that defendant with  
18 that presumption and the State must overcome it.

19 A. Uh-huh.

20 Q. Do you feel you could do that?

21 A. Yes, sir.

22 Q. Okay. The burden of proof is on the State --

23 A. Uh-huh.

24 Q. -- and it never leaves the State. In other  
25 words, it never shifts to the defense. You might anticipate

1 they may prove or put witnesses on, but you can't require  
2 them to. At the end of the trial, if they didn't put on any  
3 witnesses and you had a reasonable doubt, you would have to  
4 find the defendant not guilty because that burden of proof  
5 never shifts.

6 A. Okay.

7 Q. Do you feel you could do that?

8 A. Yes.

9 Q. And that burden of proof goes to each and  
10 every element of the indictment. We write the indictment as  
11 prosecutors and then we're required by law to prove to you  
12 beyond a reasonable doubt that each element has been proven  
13 to you. If we fail in just one element, under the law you  
14 are obligated to find the defendant not guilty.

15 A. Okay.

16 Q. An example I give is, an easy one is, we have  
17 to prove the identity, who committed this murder. If you  
18 had a reasonable doubt about that, obviously, you would find  
19 him not guilty. But just as important under the law is the  
20 county. Let's say Dallas County. If we proved everything  
21 else to you, but maybe it was one of those cases that  
22 happened near the border and you thought it was in Tarrant  
23 County or Ellis County, that would be a reasonable doubt.

24 A. Uh-huh.

25 Q. And if you had a reasonable doubt even on that



1 element, you would have to find him not guilty. Now, you  
2 may not like it. Some people view it as a technicality, but  
3 under the law it's not. And as a juror you can't go out and  
4 help us out. You have to be kind of like an umpire in a  
5 baseball game, call the balls and strikes as you see them.

6 We could probably be fired, if we bungled  
7 the case that badly. But you wouldn't be able to help us  
8 out. And I don't anticipate that to happen. But that's the  
9 example I use, just to demonstrate that concept.

10 A. Okay.

11 Q. Do you feel you can follow that particular  
12 rule of law?

13 A. Yes.

14 Q. Fifth Amendment rights. Anyone charged with  
15 an offense, if they want to testify, they can, no one can  
16 stop them. But if you choose not to testify and you are a  
17 defendant, the Court would instruct you that you can't hold  
18 that against them, because there could be many reasons why a  
19 person may choose not to testify.

20 He may be poorly educated or very  
21 nervous, maybe not perform well in front of folks, might  
22 look guilty when he's not. He may be following the advice  
23 of his lawyer who simply instructs him not to and he doesn't  
24 want to quarrel with the lawyer. They should know better.  
25 He may be real guilty and look real guilty under cross. So

1 there's a lot of reasons. The law takes care of that by  
2 telling the jurors you can't hold that against him.

3 A. Okay.

4 Q. Do you feel you could do that?

5 A. Yes, sir.

6 Q. Police officers often testify in criminal  
7 cases. And I think most jurors respect the job they do, but  
8 you can't start them out ahead of any other witness. You  
9 have to wait and judge them like you would anyone else once  
10 they testify. Do you feel you could do that?

11 A. Yes, sir.

12 Q. And, finally, our parole laws, you may have  
13 heard, they get in the news sometimes. And the Judge would  
14 instruct you in a capital case that a capital life sentence  
15 equals forty calendar years before a person becomes  
16 eligible. And that doesn't mean they would be paroled at  
17 that point in time.

18 But he would also instruct you that you  
19 can't consider that or any other parole laws in your  
20 deliberations. You just have to consider a life sentence, a  
21 life sentence. Do you feel you could do that?

22 A. Yes.

23 Q. Okay. Well, Ms. Sims, I have, I think,  
24 exhausted everything I can talk to you about. But I  
25 appreciate your patience with me.

1           A.       Thank you.

2                   THE COURT:   Ms. Busbee?   You're only  
3   halfway done.

4                   PROSPECTIVE JUROR:   Oh, okay, I'm sorry.

5                   CROSS-EXAMINATION

6   BY MS. BUSBEE:

7           Q.       Well, actually, you're more than halfway done.  
8   Mr. Shook gets to explain a lot of things to you, which  
9   makes my job easier and less lengthy because you already  
10   know the scheme.   What did your son study in college?  
11   What's he taking?

12          A.       Well, he spent two years at Texas Tech and  
13   studied some basics, English, and that type thing, but has  
14   not continued to go to college.

15          Q.       Is he planning on a career?

16          A.       He is.   He's joined the Naval Reserve and he's  
17   thinking about aeronautics.

18          Q.       I notice that your father is an architect and  
19   your husband is a CPA, so did he get that numbers ability  
20   from him?

21          A.       No, I think he shies away from that.

22          Q.       Oh, I understand that.   Um, I know, I can tell  
23   by seeing you and actually most people do, that you gave  
24   this a lot of thought before you came down here.   And you  
25   seemed kind of worried when you walked in.

1                   We don't tell people how this works, I  
2     guess by design, before we ask them their opinions because  
3     how your gut feels about a certain thing, in a case like  
4     this, we're not talking about do you pay the money or, you  
5     know, do you get probation or do you do some time in jail.  
6     This is just emotional. I think you said something about  
7     that either in your questionnaire or otherwise. Um -- and  
8     on balance it seems like you understand it.

9                   Most people when we start talking to them  
10    before we explain it to them, they are under the impression  
11    that when someone is convicted of capital murder, that it's  
12    a death penalty.

13           A.       Uh-huh.

14           Q.       But in actuality the law is it's a life  
15    sentence and it's automatic and the law favors that.

16           A.       Uh-huh.

17           Q.       And I guess what I'm going to be asking you,  
18    or the theme of these questions, just to lay it on the table  
19    is, if you can set aside whatever feelings you had about it  
20    before, and I may be over characterizing them, and give  
21    effect to this scheme as a juror on this case, because  
22    there's no problem with it, if you really are so strong a  
23    proponent of the death penalty punishment that you would  
24    have trouble doing it. And if you tell me that you would  
25    not have trouble dealing with it, doing that, I would

1 believe that as well.

2 So I guess that's my question. Sitting  
3 on a hypothetical death penalty jury, if, once you found  
4 someone guilty of the offense of capital murder, would you  
5 be able to give effect to the law? In other words, know  
6 that, knowing and follow the law that a life sentence is  
7 what that individual will receive unless the State proves to  
8 you these additional elements?

9 A. I would be comfortable with that, yes.

10 Q. Okay. Good enough. And, actually, I'm just  
11 kind of following up on this, because sometimes Mr. Shook  
12 asks questions as, did that seem right to you or do you  
13 think you can follow that? But I'd like to pin you down a  
14 little bit more, if I could.

15 A. Okay.

16 Q. Sitting on a hypothetical death penalty jury,  
17 having decided with your peers that Special Issue No. 1 and  
18 2 were yes beyond a reasonable doubt, could you give effect  
19 to Special Issue No. 3? In other words, really consider a  
20 life sentence based on things that you heard in the trial?

21 A. Yes.

22 Q. Okay. That's fair enough. Now, asking  
23 generally, more specifically, do you feel like you have  
24 formed any opinions about what should happen in this case  
25 before you have heard any evidence?

1 A. No.

2 Q. Okay. You understand why we have to have --  
3 these questions are so individual to a person, it really  
4 requires a separate jury to just determine the ins and outs  
5 of every issue and each individual actor in a death penalty  
6 case.

7 A. Uh-huh.

8 Q. Okay. Fair enough. Well, see, I told you it  
9 wasn't going to be as long. I just wanted to make sure in  
10 my mind that I had heard your answers correctly and it seems  
11 to me like you will make the State prove their case and  
12 follow the law and that's all we can ask for, so --

13 MS. BUSBEE: Your Honor, I have no more  
14 questions of this juror at this time.

15 THE COURT: Ma'am, if you will be so kind  
16 and wait for us outside the courtroom and we'll have you  
17 back in just a few moments.

18 PROSPECTIVE JUROR: Yes, sir.

19 [Prospective juror out]

20 THE COURT: What says the State on juror  
21 5156, Ms. Sims?

22 MR. SHOOK: We have no challenges for  
23 cause.

24 MS. BUSBEE: We have no challenge for  
25 cause, Your Honor. Could I have a minute with my client

1 here? Your Honor, cognizant of the -- wait, we haven't done  
2 this part, have we? We haven't done the strikes yet, have  
3 we?

4 THE COURT: No.

5 MS. BUSBEE: Okay. Sorry, got ahead of  
6 myself.

7 THE COURT: Mr. Shook, what says the  
8 State?

9 MR. SHOOK: We'll accept the juror.

10 MS. BUSBEE: Your Honor, cognizant of the  
11 fact that we have exhausted our preemptory challenges, an  
12 additional one the Court has granted us, we petition the  
13 Court for an additional preemptory challenge in order to  
14 exercise it against Ms. Sims pursuant to the grounds I  
15 requested on Thursday which would be the first, Article 1,  
16 Section 10, of the Texas Constitution, and Sixth and  
17 Fourteenth Amendments of the United States Constitution and  
18 in the spirit of equity.

19 THE COURT: Let me see counsel in my  
20 office.

21 (Recess)

22 THE COURT: Ms. Busbee, Mr. Murphy, your  
23 motion for additional challenges is denied. Ms. Sims shall  
24 become juror No. 12 on this case. Have Ms. Sims come in,  
25 please.

1 [Prospective juror in]

2 THE COURT: Thank you. You may be  
3 seated. Ms. Sims?

4 PROSPECTIVE JUROR: Yes, sir.

5 THE COURT: I'll instruct you that you  
6 have been placed on this jury.

7 PROSPECTIVE JUROR: Okay.

8 THE COURT: Now the hard part comes. You  
9 get worried about coming down here and participation for the  
10 voir dire and now you're leaving here, knowing that you are  
11 going to be actually sitting on this jury and making a  
12 decision in this case. What you are going to have to do is  
13 go back and tell your employer that you're going to need two  
14 weeks off beginning on November 10th. Now, what will happen  
15 if you share with them what you are going to be doing?

16 PROSPECTIVE JUROR: Well, I will have to  
17 cancel my schedule, basically, and --

18 THE COURT: I understand, but if you tell  
19 them, I'm going to be a juror in this particular case, they  
20 will typically offer their opinions, or if you tell your  
21 friends or even your husband, because the lawyers are very  
22 satisfied with your opinions. What we do not need is anyone  
23 else's opinion, or, well, let me tell you what I would do,  
24 dada, dada, dada.

25 We just cannot, you have to put the



1 blinders on. And you have told us -- you have taken an oath  
2 thus far to tell the truth as a juror, that you would  
3 truthfully answer all questions propounded to you concerning  
4 your qualifications to serve this Court. The next oath you  
5 will take is, I will swear to make my decisions from the  
6 evidence that I hear from the witness stand, let nothing  
7 from the outside have any influence on me whatsoever.  
8 That's why they went through the drill about the meeting.

9 Everything that you learn about this case  
10 comes from that witness stand. So I have given you some  
11 written instructions there that you will take with you today  
12 and I have another document that will be printed in just a  
13 moment from my office, since my computer is not  
14 communicating well, and you will spend some time with the  
15 Sheriff going through some other things to get you up to  
16 speed on.

17 The bottom line is, I will not waste your  
18 time when we get in the trial. I will have you down here  
19 for one more short session, most likely the week before this  
20 trial shall begin. I cannot do that until we have all 12  
21 members in this jury box. I have to have everybody here all  
22 at once to go through certain things, the last preliminary  
23 hearing we will have.

24 The reason I do that is so that Monday  
25 morning, the 10th, you will be here and know everything that

1 is going to happen and you will be in that box and we'll  
2 start the trial at 8:30. How many times have you -- you've  
3 been on a jury twice before?

4 PROSPECTIVE JUROR: Yes.

5 THE COURT: Especially a civil jury, how  
6 much time do they waste over at that courthouse?

7 PROSPECTIVE JUROR: Uh-huh.

8 THE COURT: Right?

9 PROSPECTIVE JUROR: Yes.

10 THE COURT: You won't find it over here.

11 PROSPECTIVE JUROR: Okay.

12 THE COURT: In fact, I've been told that  
13 I work too much and even had jurors go, please, let us have  
14 a break. Because I'm going to -- I work.

15 PROSPECTIVE JUROR: Okay.

16 THE COURT: We're using your time, so I'm  
17 not going to waste it.

18 PROSPECTIVE JUROR: Okay.

19 THE COURT: In return I ask you to follow  
20 some rules. And the number one rule is, just don't talk  
21 about this case, period.

22 PROSPECTIVE JUROR: Okay.

23 THE COURT: After it's all over, you can  
24 talk to whomever as long as you want. Now, on that line of  
25 thought, from this point forward, if you see me or the

1 lawyers involved in this case in the back, in the hallway,  
2 wherever, we're going to be rude to you. And you're not  
3 going to get so much as a good morning or hello out of me.

4 There's a reason for that. It's called  
5 the appearance of impropriety. Because if someone were to  
6 view myself or anyone else having a conversation with a  
7 juror and wasn't able to hear like, well, what time is it,  
8 or, you know, we're going to have a lunch break today, it  
9 may be completely benign, but if they were unable to hear  
10 and they see us communicating, then it's open for  
11 speculation. So you won't even see me communicate with a  
12 juror, period. I want you to understand why I'm being rude,  
13 same as the lawyers. There's a reason for it.

14 Now, who you do communicate with is the  
15 Sheriff. The bailiff, Ms. Duron, over here, she takes care  
16 of the jury better than anybody else down here. So she's  
17 going to visit with you in the back about some other things.  
18 And as soon as I get this document printed, she will have  
19 that to go over with you.

20 And as soon as I know, because I don't  
21 have this jury completed yet. As soon as we know what day,  
22 we'll give you plenty of notice and have you back down here  
23 for probably about an hour. And we'll start Monday morning,  
24 November 10th, okay?

25 PROSPECTIVE JUROR: Okay.

1 THE COURT: Now, I know I've given you a  
2 lot to think about. Do you have any questions of me or  
3 concerns?

4 PROSPECTIVE JUROR: Not at this point.

5 THE COURT: You know you will as soon as  
6 you walk out.

7 PROSPECTIVE JUROR: I'm sure I will.

8 THE COURT: And you've got Sheriff Bryan  
9 Cook's phone number, the one that was on the letter I sent  
10 you. You can communicate with the Sheriff, but not the  
11 Court.

12 PROSPECTIVE JUROR: Okay.

13 THE COURT: So if you would, retire to  
14 the jury room and I'll have that document printed in just a  
15 moment.

16 [Prospective juror out]

17 THE COURT: Back on the record. The  
18 Court, now having seated twelve jurors in this matter,  
19 pursuant to Article 33.011, the Court intends to seat two  
20 alternate jurors pursuant to Article 35.15 of the Code of --  
21 35.15(d), Code of Criminal Procedure, each side is entitled  
22 to one additional preemptory challenge in addition to those  
23 otherwise allowed by law, if I seat one or two alternate  
24 jurors. Does the State concur?

25 MR. SHOOK: Yes.

1 THE COURT: Defense?

2 MS. BUSBEE: Yes, Your Honor.

3 THE COURT: Sheriff, would you be so kind  
4 as to ask Mr. Campbell to come in.

5 [Prospective juror in]

6 THE COURT: Good afternoon, sir. How are  
7 you?

8 PROSPECTIVE JUROR: Good afternoon, I'm  
9 fine.

10 THE COURT: For the record, we've got  
11 juror No. 5120, Edward M. Campbell, Sr.; is that correct?

12 PROSPECTIVE JUROR: That is correct, Your  
13 Honor.

14 THE COURT: Mr. Campbell, have you had an  
15 opportunity to review the guide I provided for you this  
16 afternoon?

17 PROSPECTIVE JUROR: Yes, sir, I have.

18 THE COURT: I also see you have looked at  
19 your questionnaire and folded it up and ready to move on; is  
20 that correct?

21 PROSPECTIVE JUROR: Yes, sir.

22 THE COURT: All right. Good. The  
23 attorneys are going to visit with you about that  
24 questionnaire and they may ask you to explain some of your  
25 answers or to expound on them. The law I gave you is to

1 help you to begin to think about the issues that are  
2 concerning this case.

3 You don't have to have a complete  
4 knowledge of it at this point. That's what this interview  
5 is all about, as the attorneys will visit with you about the  
6 law. At the end of the process, we want you to have a good,  
7 working, functional understanding of the law. If you don't,  
8 then we need to back up and try again.

9 The Court has two questions that I must  
10 ask at the end of this session. Number one is, do you, in  
11 fact, understand the law? And number two, can you follow  
12 the law? That's the big picture I have to look at. The  
13 only question I have for you now, sir, is will you be able  
14 to serve this Court for a period of two weeks beginning on  
15 November 10th?

16 PROSPECTIVE JUROR: Unfortunately, yes,  
17 Your Honor.

18 THE COURT: With that, I'll turn it over  
19 to Mr. Wirskye.

20 MR. WIRSKYE: May it please the Court?

21 EDWARD CAMPBELL, SR.  
22 having been duly sworn, was examined and testified as  
23 follows:

24 DIRECT EXAMINATION

25 BY MR. WIRSKYE:

1 Q. Mr. Campbell, how are you this afternoon?

2 A. I'm fine, sir.

3 Q. Thank you for bearing with us as the afternoon  
4 is growing long, but we appreciate your patience. My name  
5 is Bill Wirskye. I'll be the Assistant DA that will be  
6 visiting with you for the next few minutes.

7 What I'd like to do is follow up on some  
8 of that information that you were kind enough to provide in  
9 that lengthy questionnaire we had you fill out, talk to you  
10 a little bit about your thoughts and feelings about the  
11 death penalty, then maybe talk to you a little bit about  
12 some of the laws and the rules that apply in this sort of  
13 case where the State is seeking the death penalty.

14 So tell us what line of work you're in.  
15 I know you said you sold fiber optic lighting?

16 A. Basically, I have downsized from the fiber  
17 optic lighting company. I started a small installation  
18 company a couple of years ago, so I'm semi-retired.

19 Q. Okay. And do you work a full day, or --

20 A. No.

21 Q. Okay. What do you do on a day-in, day-out  
22 basis?

23 A. I sit on my boat.

24 Q. Okay. What kind of boat do you have?

25 A. Forty-four foot houseboat.

1 Q. Okay. What lake?

2 A. Lake Grapevine.

3 Q. Okay. Let's see. We also ask people, you  
4 know, if they've known anyone that has had any contact with  
5 the system. And I think you indicated that you had a  
6 brother, Bill Campbell, back in 1979 in Indiana --

7 A. That's correct.

8 Q. -- had a drug case. What do you remember  
9 about that?

10 A. I really don't know that much about that  
11 particular situation. He was caught in Indiana with a large  
12 amount of Valium, I think. He passed away eight, ten, years  
13 ago, so --

14 Q. Okay. As far as you know at the time he was  
15 treated fairly by law enforcement, that type thing?

16 A. To the best of my knowledge, yes.

17 Q. Okay. Now, you told us you're generally in  
18 favor of the death penalty; is that right?

19 A. In certain situations, yes.

20 Q. Okay. What type of certain situations come to  
21 mind when you think about an appropriate case for the death  
22 penalty?

23 A. I probably would have to say in a case that  
24 involved murder or anything of very severe instances against  
25 children.



1 Q. Okay. And we hear that quite a bit, murder  
2 cases and child abuse cases, that type thing?

3 A. That's correct.

4 Q. Also, if you could, I know you've got your  
5 questionnaire in front of you, on the bottom of page 3 we  
6 asked a question, and it's not the most clearly worded  
7 question, I know, but the very last question, do you agree  
8 with the law in the State of Texas that a murder while in  
9 the course of robbery is a capital offense, one for which  
10 you can get the death penalty, and you marked no. And I was  
11 just kind of curious to follow up with you up on that.

12 A. Well, I was curious when I reread that why I  
13 did that myself. I do not have a good answer for that one.

14 Q. It's a confusing question. I know you got a  
15 chance to look at the packet of the law that the Judge has  
16 given you. Obviously, in Texas, hopefully it's clear from  
17 the packet, that we reserve the death penalty just for  
18 murder cases and then only a certain subset or certain type  
19 of murder case.

20 If you kill a police officer, a fireman,  
21 prison guard on duty, murder in the course of another felony  
22 like robbery, burglary, rape, mass murder, serial murder, if  
23 you kill a child under six, those are the type cases in  
24 Texas that we reserve the option of the death penalty for.

25 Is that something that is pretty much in

1 agreement or are you in accord with that list of the type  
2 offenses?

3 A. I am. And if I had this to do over again,  
4 that was just a quick trying to get out of the room answer  
5 to my questions.

6 Q. I certainly understand that with the 17-page  
7 questionnaire. Also, on page 4, the very next page, we  
8 asked you, a little above the middle of the page, do you  
9 ever think the death penalty is misused, and you checked  
10 yes. I just kind of wanted to follow up with you on that.

11 A. You know, just I had heard some things through  
12 the television and media where people had been charged with  
13 the death penalty or incarcerated and then, through some  
14 process, were able to prove DNA or whatever to get them out.

15 Q. Any specific case that you are thinking of?

16 A. No, no specific cases at all.

17 Q. Okay. Would that be a concern of yours  
18 possibly being a juror on a capital case like this?

19 A. No, it would not.

20 Q. Okay. And then, finally, I guess the second  
21 to the last question, we asked what would be important to  
22 you in determining whether a person received a death or a  
23 life sentence in a capital case and you said his or her  
24 proven involvement. And I was just kind of curious to  
25 follow up with you on that, what exactly you meant by that.

1 A. Excuse me, where are we?

2 Q. Page 4, second to last question.

3 A. Oh, page 4, you said second to last question,  
4 so I went to the end of the book.

5 Q. Page 4, second to the last question, what's  
6 important to you in deciding whether a person receives life  
7 or death?

8 A. I don't follow directions very well,  
9 apparently. Oh, I guess I was trying to say is, I mean, if  
10 there was proof that there was involvement, then I would be  
11 much in favor of it.

12 Q. Okay. Let me ask you one more question to  
13 kind of follow up on that answer, but on the next page, page  
14 5, we asked you kind of the first thing that pops into your  
15 head when you think of prosecutors and defense lawyers, and  
16 it looked like you had the same answer for both. You said  
17 tangled truth tellers. I'm just kind of curious, asking for  
18 both sides of the attorneys here, just kind of what you  
19 meant by that?

20 A. I think you gentlemen and ladies have tough  
21 jobs, and I think when you have your jobs, you have to  
22 stretch the truth in certain areas to make your points  
23 across, and you have to sell your side of it. And sometimes  
24 I think it has to be very difficult on all your parts.

25 Q. Okay. Is that something if you were a juror

1 in this case, you would expect from both sides, a little bit  
2 of the truth stretching?

3 A. Well, I think it's more of a debate at that  
4 point. I mean, you can take one side of it today and she  
5 can take the other side of it tomorrow and then have to swap  
6 places the next week. So I think I understand what you  
7 ladies and gentlemen have to do for a living.

8 Q. Well, I think, you know, speaking for both  
9 sides, obviously, we're concerned, we don't want somebody  
10 over there in the jury box that thinks we're stretching the  
11 truth for either side.

12 A. You know, that was just a candid response.  
13 You know, it's just I think attorneys have to defend people  
14 that are, you know, that they know are guilty, and you are  
15 trying to make sure that they get a fair shake.

16 Q. You can imagine the variety of responses we  
17 get on these questionnaires.

18 A. I can.

19 Q. Let me follow up with you a little bit on the  
20 death penalty. You had mentioned, you know, proof of the  
21 person's involvement. And one area we always talk to every  
22 potential jury about is, basically, the law of accomplices.  
23 We call it the law of parties in Texas, but, basically, it's  
24 this. You know, oftentimes crimes can be committed by more  
25 than one person. A group or a gang of individuals can

1 commit a crime.

2           The law allows us to prosecute everyone  
3 for that crime that's actively involved in the crime. And  
4 when you take a scenario like capital murder where more than  
5 one person is actively involved in a crime, you may have a  
6 situation where just one person was the actual triggerman,  
7 or the shooter, for lack of better terms. One person  
8 actually caused the death during the commission of that  
9 capital murder.

10           And you may have some other people who  
11 didn't actually cause the death, but were otherwise actively  
12 involved in the crime. "Accomplices" is the word most  
13 people think of.

14           Some people we talk to who may feel very  
15 strongly about the death penalty would reserve the option of  
16 the death penalty just for the person that actually pulled  
17 the trigger, just for the person that actually took the  
18 life. And if it were up to them, the death penalty simply  
19 wouldn't be an option for those accomplices who didn't take  
20 a life. You know, they may want to lock them up in prison  
21 for a long time, but for whatever reason, religious, moral,  
22 or ethical, they don't think the death penalty is  
23 appropriate for those accomplices.

24           And some people feel differently. They  
25 just say, you know, I wouldn't automatically take the death

1 penalty off the table for the accomplices, it just kind of  
2 depends on the facts and circumstances. And we ask  
3 everybody this. And I'm just curious kind of where you come  
4 down on that issue.

5 A. As far as the accomplices, I understand only  
6 maybe possibly one person actually fired the killing blow,  
7 but the parties involved were all there as a team.

8 Q. Okay. Would you envision or could you see  
9 having the death penalty maybe for a nontriggerman  
10 accomplice?

11 A. I think it would have to be a very rare  
12 situation where someone held a gun to his head to make him  
13 be involved in the situation.

14 Q. Okay. Explain that to me a little bit more.  
15 I'm not sure I'm following you.

16 A. If one of the team members forced somebody  
17 else to be party in this project and they were really doing  
18 it against their will.

19 Q. Okay. That's a situation where you wouldn't  
20 consider the death penalty for an accomplice?

21 A. That possibly could be, correct.

22 Q. Okay. I think you are probably where the law  
23 is in Texas, but let me give you a quick example to explain  
24 the law. Say Mr. Shook and I, the other prosecutor, decide  
25 we're going to rob a bank. We get together and plan that

1 he's going to carry a gun in. He's going to hold up the  
2 tellers. And while he holds them at bay, I'm going to go in  
3 with a bag and kind of empty out the cash drawers. I'm  
4 going to be unarmed.

5 And, let's say, as we go to do that bank  
6 robbery, for whatever reason, maybe one of them looks at him  
7 funny, maybe I see one of them going for a silent alarm and  
8 I alert him to that fact, or for whatever reason, he shoots  
9 and kills one of the tellers. He's committed a capital  
10 murder. He could be prosecuted for it and ultimately  
11 receive the death penalty.

12 The law says, depending on the facts and  
13 circumstances, that I could, too, even though I was unarmed  
14 and even though I didn't cause the death, the accomplice.  
15 What do you think of that type of law and that type of  
16 scenario?

17 A. Not knowing any more facts about the scenario  
18 you're trying to give, I would have to say that you would  
19 also be eligible for the death penalty.

20 Q. Okay. What would be important to you in  
21 making that decision? What fact or factors?

22 A. Well, you were going to gain in the reward of  
23 it.

24 Q. Okay. Anything else you can think of that  
25 would be important?

1           A.       I think the two of you are a team at that  
2 point.

3           Q.       Okay. Fair enough. Let me ask you this.  
4 Just like everybody we've talked to, you've indicated that  
5 you've heard some of the publicity or you know a little bit  
6 about the facts of this case; is that right?

7           A.       Through the media, yes.

8           Q.       Okay. Can you tell us what you know about the  
9 case? What you've heard?

10          A.       Well, I think once the parties all broke out  
11 of prison, I think it was a fear factor for everybody in the  
12 state. And the closer that we were to Irving -- I reside in  
13 Coppell. It did bring a danger point to all of us. And  
14 then the availability of them escaping as far as they were  
15 able to escape and become national. It just made it that  
16 much more magnified of what type of individuals that the  
17 system was dealing with.

18          Q.       Okay. Do you remember hearing any of the  
19 facts of the crime?

20          A.       Facts of the crime that they committed at the  
21 Oshman's Sporting Goods store?

22          Q.       Yes, sir.

23          A.       I would say, yes.

24          Q.       Okay. What is it that you recall?

25          A.       That they were inside the store, getting guns



1 and radios or something of that nature. And when they came  
2 out were approached by a police car and then somebody just  
3 started randomly shooting to get away.

4 Q. Okay. Have you kept up with any of the other  
5 court proceedings or maybe other trials in these cases?

6 A. None. Not, not intentionally.

7 Q. Sure.

8 A. But through the media, I think this is the  
9 last one that's available. Is it?

10 Q. Okay. Are you aware of the verdicts in the  
11 other cases?

12 A. To the best of my knowledge, I am.

13 Q. Okay. Like I said, we talk to a lot of people  
14 and that is partially one of the reasons we do it because  
15 this case did generate so much publicity. We know it  
16 affects different people differently. You are not  
17 automatically disqualified, just because you have heard  
18 something about the case or just because you formed some  
19 impressions or conclusions about what you have heard.

20 The test is in order to be qualified,  
21 that you will be able to assure the Judge that you would  
22 base your verdict in this particular case just on the  
23 evidence and the facts you hear in the courtroom and not on  
24 anything you may have gotten from any other media sources or  
25 anything like that. Is that something you think you could

1 do?

2 A. I know I could do that.

3 Q. Okay. And why do you say that?

4 A. I know myself. I mean, from my upbringing  
5 through military and Boy Scouts and fatherhood and there's  
6 right and there's wrong, and --

7 Q. Okay. Okay. You could put that out of your  
8 mind and just base your verdict on what you hear?

9 A. Yes.

10 Q. Okay. Fair enough. Again, you know, we do  
11 talk to quite a few people. A lot of people may be very  
12 strongly in favor of the death penalty in the right case or  
13 the certain circumstance such as yourself.

14 But I think when we get to this point in  
15 the process with those people, when you are no longer  
16 talking about the death penalty philosophically or in the  
17 abstract, I think it becomes a little more real to some  
18 people and some people at this point have some hesitations  
19 about possibly being on a jury that makes those life and  
20 death decisions in a capital murder case.

21 In Texas we don't ask a jury at the end  
22 of all the evidence to write in a life sentence or write in  
23 a death sentence. We ask them to answer these three  
24 questions up here. And just very quickly in a nutshell, and  
25 we'll talk about them more in a minute, the first question

1 asks whether the person is a future danger, whether they are  
2 a continuing threat to society.

3 If that's answered yes, then we move to  
4 the 'second Special Issue, which deals with that accomplice  
5 scenario that we've already talked about. Basically, did  
6 the person intend a human life to be taken or did they  
7 anticipate a human life would be taken?

8 And if that is answered yes, then you  
9 move to the third question, which asks is there anything  
10 mitigating, is there anything based on the facts that a jury  
11 thinks the person's life ought to be spared and they should  
12 be given a life sentence rather than a death sentence.

13 And if that's answered no, then a death  
14 sentence is automatic. The Judge has no discretion. But we  
15 kind of let the answers to these three questions determine  
16 what the appropriate sentence is. So before we go any  
17 further, I just want to make sure that you feel, knowing  
18 yourself as you do, that you're the type person that could  
19 participate in that process, that could be on a jury in a  
20 capital case and take pen in hand and answer these questions  
21 in such a way that it may ultimately result in the execution  
22 of another human being?

23 A. Yes, sir, I do.

24 Q. Okay. And why do you feel that way?

25 A. It gets to be my own philosophy. Because I'm

1 an Eagle Scout and I've raised two young men through the  
2 teenage/adult statues. They've both been members of the  
3 military. I think as a single parent, we had a strict set  
4 of guidelines that we -- I chose to bring my two guys up in  
5 and --

6 Q. Okay. Okay. So you feel like you are the  
7 type person that could make those type of decisions --

8 A. Yes, sir.

9 Q. -- those questions? Okay. One final question  
10 I wanted to ask you. We always ask everybody on the  
11 questionnaire to kind of rank themselves on a scale of 1 to  
12 10 if you are in favor of the death penalty, how strongly do  
13 you feel about it? And I think you gave yourself a 9 out of  
14 10. And I know that means different things to different  
15 people and I'm just kind of curious what that 9 meant to  
16 you?

17 A. I would say I'm very strongly, um, believe in  
18 it in those very certain situations where lives are taken or  
19 there's abuse or something to a child.

20 Q. Okay. And, again, you'd feel comfortable  
21 looking at the death penalty, depending on the facts and  
22 circumstances in a situation where an accomplice is  
23 involved?

24 A. I don't think that I would be comfortable.  
25 But I think that I would be qualified.

1 Q. Okay. You at least have no hesitation about  
2 it?

3 A. That's right.

4 Q. Okay. And I'll be very honest. The reason we  
5 cover that accomplice in such detail is that is the theory  
6 of law we're prosecuting this case under, the law of  
7 accomplices or the law of parties. So that's why we spend  
8 so much time making sure everyone at the very least has no  
9 hesitations about it.

10 Let's talk a little bit more about these  
11 questions kind of in some detail. I know you had a chance  
12 to look at them just for a second earlier and you probably  
13 read a version of them in the packet you had, but if you  
14 could, just take a moment or two and read through those  
15 three real quickly so we can talk about them in turn.

16 A. (Prospective juror complies.) Yeah, I think  
17 I've read them three times.

18 Q. Okay.

19 A. I was in my room for a while.

20 Q. You probably got a little claustrophobic back  
21 there?

22 A. Yes, I did.

23 Q. Yeah, that room seems to have --

24 A. It needs to have a window in there.

25 Q. -- seems to have that effect on people. What

1 the law envisions is, basically, all trials in Texas, even  
2 capital murder trials, are in two parts. The first part of  
3 the trial is the guilt/innocence phase where you are just  
4 concerned with whether the person is guilty or not of  
5 capital murder. Did we prove to you what is in our  
6 indictment?

7 If you think we have proven his guilt to  
8 you beyond a reasonable doubt, you'd find him guilty of  
9 capital murder and move to the second phase of the trial,  
10 which is the sentencing phase, where you are called upon to  
11 answer these three questions.

12 Before you are given these three  
13 questions to answer, you get to hear extra or additional  
14 information in that second phase, the sentencing phase, of  
15 the trial. You get to hear evidence about the person's  
16 criminal history, if it exists, his reputation, his  
17 character, background, good or bad, that type thing. And,  
18 again, we let you hear this sort of evidence so you can  
19 answer these three questions.

20 And the law really contemplates or  
21 envisions that just because you found someone guilty of  
22 capital murder, you'd be able to start that second phase of  
23 the trial with an open mind as to the answer to these three  
24 questions.

25 You know, very frankly, we have some

1 people that tell us, you know, I just can't do that. If I  
2 found somebody guilty of capital murder, it's automatically  
3 always going to cause me to answer one of these questions in  
4 such a way -- for instance, question No. 1, I'm always going  
5 to think they are a future danger. And if you feel that  
6 way, that's fine. You simply wouldn't be a qualified juror.

7 But in a sense, I guess, the law requires  
8 that jurors use that little bit of mental discipline and be  
9 able to have an open mind as they start that second phase of  
10 the trial. Does that make sense to you?

11 A. Yes, it does.

12 Q. Okay. Is that something that you think you  
13 could do?

14 A. Yes, I do.

15 Q. Okay. Again, that first question, whether  
16 there's a probability the defendant would commit criminal  
17 act of violence such that they would be a continuing threat  
18 to society, that question starts off with a no answer. It's  
19 part of our burden of proof to prove it to you beyond a  
20 reasonable doubt that that question should be answered yes.  
21 It's not answered yes, unless we meet our burden of proof  
22 and prove to you that there's that probability that exists.

23 The words in these questions are not  
24 necessarily defined legally, like a lot of things we deal  
25 with. So we always are curious to ask each juror kind of

1 how they would define or what certain terms mean to them.  
2 And when you see that word "probability," how would you  
3 define that or what pops into your head?

4 A. Is there a possible chance that being  
5 reincarcerated, he could eventually come out and do  
6 something else to somebody else?

7 Q. Okay.

8 A. Or while he's in prison, be able to do  
9 something to somebody else.

10 A. Okay. When you think about probability, do  
11 you think about a likelihood or greater than not chance or  
12 when you think about that word "probability"?

13 A. Into this particular individual or into -- are  
14 we looking at it as an individual standpoint or are we  
15 looking at it as the wording here?

16 Q. No. We're not talking about this case  
17 specifically. Obviously, we can't go into this case or  
18 preview the facts.

19 A. Okay. So --

20 Q. Just in general in a hypothetical capital  
21 murder case. And, again, the law doesn't give us a  
22 definition. It gives us a little bit of guidance.

23 A. And I think at that point I would have to go  
24 through the trial and believe that there would be a  
25 probability issue there, yes.



1 Q. Okay. And, again, the law says, you know,  
2 we're talking about in terms of a probability, not a  
3 certainty. We could never prove anything to you to that  
4 level of certainty. But a probability would be something  
5 more than just a mere possibility.

6 A. That's correct.

7 Q. Because anything would be possible.

8 A. Anything we're reading in these questions,  
9 we're actually not even looking at the particular case  
10 involved?

11 Q. You would be given these questions at the end  
12 of all the evidence, after you --

13 A. But in your interrogation right now, we're  
14 really not looking at this particular case at all.

15 Q. No. No, sir.

16 A. We're just looking at this in generality  
17 terms?

18 Q. Yes. We can't -- neither side can go into the  
19 facts. Neither side can try to convince you on how you'd  
20 vote in this particular case. We just like to kind of get  
21 people's gut reactions. For most people, you may be like  
22 most people. This whole kind of capital sentencing scheme  
23 is new to them. You know, most people really have no idea  
24 what the scheme is in Texas, unless, you know, you are in  
25 our line of work. So that's why we go through this.

1                   That phrase "criminal acts of violence"  
2     in that second line. What comes to mind when you think of a  
3     criminal act of violence?

4           A.       I would say, you know, it could be something  
5     as simple as just fighting, you know, being incarcerated,  
6     causing a disturbance to the point of making the prison life  
7     even unsafe.

8           Q.       Okay. And I think you're following up on my  
9     next point. We always ask people, you know, how they would  
10    define "society" and I think most people would define it not  
11    only the society out in the free world, you know, where we  
12    walk around, but also life behind bars.

13          A.       Correct.

14          Q.       It sounds like that's where you are going?

15          A.       Yes.

16          Q.       You could be a danger to, I guess, other  
17    inmates, guards, nurses, that type thing?

18          A.       Correct.

19          Q.       Okay. Again, that starts off with a no  
20    answer. It's part of our burden to prove it to you that it  
21    should be yes. Special Issue No. 2 is exactly the same way.  
22    It starts off with a no answer. That's kind of the default  
23    setting on those two questions. And it's up to us to prove  
24    it to you beyond a reasonable doubt that the answer should  
25    be yes. And, again, this issue deals with what we've

1 already talked about, the accomplice situation.

2 A. Accomplices.

3 Q. There's really three parts to that question.

4 If you think he's the triggerman, he actually caused the  
5 death, you can answer it yes. If you think he didn't pull  
6 the trigger, but he intended to kill the person, you would  
7 vote yes. Or the last line, if you think the person  
8 anticipated that a human life would be taken, you would vote  
9 yes.

10 In order to convict someone of capital  
11 murder as an accomplice in Texas, the law is that the person  
12 should have anticipated that a life would be taken. Going  
13 back to my example, a lot of people feel that, you know, the  
14 mere fact that my teammate went in with a loaded gun, I  
15 should have anticipated that a life would be taken.

16 When you get to this question in the  
17 punishment phase, the law imposes a little higher standard  
18 before we can get to the death penalty. Instead of should  
19 have anticipated, it's actual anticipation. You know, did  
20 the person anticipate that a life would be taken. And it  
21 may be the exact same evidence that you go back and look at  
22 to decide that or you may take into account, you know, his  
23 criminal history, if he has one, to help you answer that  
24 question.

25 But it's important, I think, that jurors

1 see that the law makes that distinction and you see some  
2 sort of distinction between those two standards, "should  
3 have" and "did anticipate." Does that make sense to you?

4 A. Yes, it does.

5 Q. Okay. Again, that's part of our burden of  
6 proof to prove it to you. If both of those questions are  
7 answered yes, then you move to this third Special Issue.  
8 That's kind of the last stop in the process. We call it the  
9 mitigation question.

10 It basically asks a jury to, you know,  
11 step back, take a deep breath, look back at all the evidence  
12 you've heard in both phases of the trial, the facts of the  
13 crime, the facts of the defendant's character and  
14 background, and what sort of personal moral blame he bears  
15 in what happened, and ask yourself is there anything that  
16 lessens his personal blame? And if there is, if there's  
17 something there that's mitigating, is it sufficiently  
18 mitigating that his life ought to be spared?

19 Some people say it's the jury's chance to  
20 show mercy at that phase of the trial, if they think it's  
21 deserved based on the facts. Does that make sense to you?

22 A. Yes, it does.

23 Q. Okay. Do you see the value in having that  
24 question, even that late in the process?

25 A. Yes, I do.

1 Q. Okay. And, again, you know, the law requires,  
2 as with each of these, that the juror make kind of an  
3 independent inquiry into each question, that you don't  
4 answer No. 1 yes automatically just because you found him  
5 guilty. Or, conversely, you don't answer No. 3 no, just  
6 because you found him guilty and found 1 and 2 yes. But you  
7 keep that open mind and let the chips fall where they may,  
8 depending on the evidence.

9 Looking at question 3, is there anything  
10 that comes to mind to you that might be potentially  
11 mitigating, again, in kind of that hypothetical capital  
12 murder case?

13 A. I guess there could always be. But I would  
14 give that it's fair due upon hearing the evidence that one  
15 of you would have presented.

16 Q. And this question is different, because  
17 neither side has the burden of proof. We don't have to  
18 prove it to you that the answer should be no. They don't  
19 necessarily have a burden to bring you any evidence. That  
20 mitigation evidence could actually come from our evidence,  
21 you know, based on the facts of the crime.

22 We always ask people that question, if  
23 they can think of anything mitigating. The most common  
24 answer is no. We hope you don't sit around thinking about  
25 these type things. The law says you don't have to consider

1 any particular fact or factors mitigating.

2 To be a qualified juror, you just have to  
3 be able to keep an open mind. And if you hear something  
4 that you think might be mitigating, you will listen to it  
5 and give it the credibility that you think it deserves.  
6 Does that make sense to you?

7 A. Yes, it does.

8 Q. Some people tell us maybe a person's  
9 background, you know, if there's kind of an early  
10 well-documented history of mental, physical, or emotional  
11 abuse. Some people say that might be potentially  
12 mitigating. Other people say, you know, my heart may go out  
13 to you, but at some point you're an adult. You have to get  
14 over your past and you are responsible for your own  
15 decisions, that type thing. Where do you kind of fall on  
16 that spectrum with that issue?

17 A. You know, I hate to play right in the middle,  
18 but unfortunately I'm going to have to say I'm right in the  
19 middle, depending on the circumstances of that particular  
20 situation.

21 Q. Okay. And I think that's all the law  
22 requires, you keep an open mind. You know, we are not  
23 allowed, again, to commit you on a certain fact or factors  
24 or the facts of this case. But as long as you can keep an  
25 open mind to each of these three issues, you would be a

1 qualified juror. And it sounds like that's something that  
2 you think you would be able to do?

3 A. Yes, it is.

4 Q. Okay. Oftentimes in these cases, you may hear  
5 from expert witnesses in the punishment phase, the second  
6 phase of trial, psychiatrists or psychologists may be called  
7 by the defense or the State or even both sides to kind of  
8 help give a jury guidance to Special Issue No. 1 or Special  
9 Issue No. 3. And we're always curious to get people's kind  
10 of gut reaction on those type of witnesses in these type of  
11 cases.

12 Some people think they can be helpful.  
13 Some people just consider it, I guess, a soft science and  
14 they just wouldn't put any stock at all in a paid expert  
15 witness. But where do you kind of come down on that issue  
16 of the expert witness?

17 A. I have a hard time, sometimes, with expert  
18 witnesses, from litigation beyond this type of situation, in  
19 liability suits.

20 Q. Okay.

21 A. I think some of those can be very out of the  
22 blue.

23 Q. Okay. Would it be a situation where you just  
24 automatically close your mind to that type?

25 A. No.

1 Q. You'd just listen to it?

2 A. Yes.

3 Q. Okay. And I think you indicated that you had  
4 been involved in some business civil litigation; is that  
5 right?

6 A. Primarily most of mine have been divorce  
7 courts. I've been in the swimming pool business for 30 some  
8 years, so there's been a lot of diving board instances that  
9 I've been associated with, but never participated in.

10 Q. Okay. Fair enough. You can probably, also,  
11 anticipate police officers are going to testify. The law  
12 simply requires that you start a police officer out at the  
13 same level of credibility, that you don't give them an  
14 automatic leg up, just because he walks in wearing a badge  
15 or a gun or that type thing. Is that something you think  
16 you could do?

17 A. I know I can do that.

18 Q. Okay. Let me run through some kind of basic  
19 constitutional protections. Many of these you are probably  
20 familiar with. The burden of proof, we kind of touched on  
21 it already, is always on this table. We've got to prove to  
22 you the person is guilty. We've got to prove to you Special  
23 Issue No. 1 and 2. You can't ever look to these folks or  
24 this table to bring you any proof or bring you any evidence.

25 Legally, they can sit there and do



1 crossword puzzles the whole trial. They're not going to do  
2 that. They're fine lawyers. But it serves to make the  
3 point that you always have to look to us and you can't  
4 require them to bring you any proof. Is that a law you  
5 think you could follow?

6 A. I know it is.

7 Q. Okay. As a part of that, a person is always  
8 presumed innocent. That presumption does not go away unless  
9 and until we prove a person guilty beyond a reasonable  
10 doubt.

11 A. Beyond a reasonable doubt.

12 Q. Exactly. A person also has a Fifth Amendment  
13 right not to testify in their own defense. No one can force  
14 him to take the stand in his defense, unless he wants to.  
15 Conversely, if he wants to take the stand, no one can stop  
16 him.

17 If you are a juror in a case where he  
18 doesn't testify, the Judge would instruct you that you  
19 simply cannot hold that against him. It can't be held as a  
20 circumstance against him. There may be many reasons why he  
21 doesn't testify. He may not be a good speaker, he may be  
22 guilty or he may just be acting on his lawyer's advice. Do  
23 you think you could follow that law?

24 A. I know I can.

25 Q. Okay. Also, another area we talk to people

1 about, I know you've gotten a chance to read our indictment  
2 in the case. Our indictment, basically, breaks down into  
3 different elements of the crime. The law says we have to  
4 prove to you beyond a reasonable doubt each and every  
5 element of the crime that we have alleged.

6 And the law says, curiously enough, that  
7 one element is no more important than another legally. The  
8 elements kind of in a hypothetical murder case would be that  
9 a certain person on or about a certain day in a certain  
10 county killed another person in a certain way. Those would  
11 roughly be the elements of the crime that we'd have to prove  
12 to you. And if you had a reasonable doubt about any of  
13 those elements, the law would require you to find the person  
14 not guilty. Does that make sense?

15 A. Yes, it does.

16 Q. Just kind of an extreme example of that to  
17 kind of show you the mental discipline sometimes we require  
18 of jurors, I don't think this would ever happen, but one of  
19 those elements would be the county the case happened in.

20 Say we didn't do our jobs, we didn't  
21 investigate or research the case properly. You were a juror  
22 on a murder case. We allege the murder happened in Dallas  
23 County. You're convinced the guy is guilty. You think he's  
24 good for the murder, but you think the murder happened in  
25 Tarrant County. Again, we screwed up. You would have a

1 reasonable doubt about that one element, the county. And  
2 the law would require you to find a person not guilty.

3           You may not like it. You may think it's  
4 a technicality. But that's what the law requires. I guess  
5 one way to look at it is, you know, one person's  
6 technicality is another person's constitutional right. Is  
7 that a law you think you could follow if you had to?

8           A.       I know it is.

9           Q.       Okay. One way to kind of look at this capital  
10 murder scheme that we have, is once a person is convicted of  
11 capital murder, they are sitting on a life sentence. Okay?  
12 And the only way we get to the death penalty is if these  
13 questions are answered yes, yes, and no. I think we've  
14 covered that.

15                   Just to let you know what a life sentence  
16 for capital murder means in Texas, and the Judge would tell  
17 you this if you were a juror, it means forty calendar years  
18 before a person becomes eligible for parole. Okay? There's  
19 no life without parole in Texas. But it would be forty  
20 calendar years before a person would see that first Parole  
21 Board.

22                   Since those decisions about parole are so  
23 far in the future, you know, and the person may make parole  
24 after forty years or they may never make parole and actually  
25 serve that life sentence, we kind of require that jurors at

1 this point just assume that a life sentence means an actual  
2 life sentence. Is that something you think you could do?

3 A. Yes.

4 Q. Okay. Do you have any questions at all about  
5 this kind of sentencing scheme that we've gone over or  
6 anything like that?

7 A. I really don't at this time.

8 Q. Okay. Does it seem --

9 A. I mean I understand the basics and I'm sure  
10 there are areas that I'm not sure of, but --

11 Q. Okay. Again, kind of the bottom line to all  
12 of this, no matter what your personal views may be, as long  
13 as you can set them aside and tell us that you can follow  
14 the law and, importantly, kind of keep that open mind with  
15 respect to all the three Special Issues until all the facts  
16 and evidence are in to make your decision, and I think you'd  
17 be a qualified juror.

18 Let me check with my co-counsel just a  
19 moment. Okay. Mr. Campbell, thank you, I appreciate it.

20 MR. WIRSKYE: Judge, that's all I have.

21 THE COURT: Halfway through.

22 PROSPECTIVE JUROR: Oh, halfway through?

23 THE COURT: Yes, sir.

24 PROSPECTIVE JUROR: Aye!

25 THE COURT: You know how lawyers are,

1 they all want to talk to you.

2 PROSPECTIVE JUROR: Yeah, okay.

3 CROSS-EXAMINATION

4 BY MS. BUSBEE:

5 Q. Now, Mr. Campbell, what kind of system would  
6 it be if only the State got to talk to you?

7 A. It would not be a fair system, I apologize.

8 Q. That's right, I know. But I don't have to  
9 talk to you as long, because I don't have to tell you  
10 anything so much. I just have to ask questions. They've  
11 already laid the scheme out for you, so I just have some  
12 questions. I notice one of your sons is a firefighter?

13 A. Yes, he is.

14 Q. Where is that?

15 A. Farmers Branch.

16 Q. Farmers Branch. So he's closeby?

17 A. Yes, he is.

18 Q. And where is your other son? I notice he's in  
19 college. What is he studying?

20 A. Right now, he's studying bartending.

21 Q. Okay. And --

22 A. He's not going to college, but he was going to  
23 college when I wrote this. He has since gone to be a  
24 bartender.

25 Q. Okay. Is that just a hiatus from his

1 education?

2 A. That's what I've been told.

3 Q. You hope so. What was he planning on doing  
4 and you planned on him doing?

5 A. Computer technologies.

6 Q. Okay. I'm sure that it makes parents nervous,  
7 but they often do come back and do just fine. Where is he  
8 bartending?

9 A. In Coppell, Texas.

10 Q. In Coppell. Okay. Well, he's closeby.

11 A. Yes, he's right down the street.

12 Q. All right. Fortunately, you had a chance to  
13 read over these Special Issues and, obviously, are a quick  
14 study, so I don't necessarily want to go over them in detail  
15 with you. I did have some questions, though.

16 Just like anyone who comes down here and  
17 the State explains to them that people can be convicted of  
18 capital murder and then considered for the death penalty, if  
19 they are what we've been referring to as a nontriggerman,  
20 you expressed some surprise and then you set forth a  
21 scenario in which case, and I'm not even sure what you were  
22 talking about, because I think it was asked you two ways.  
23 Were you talking about somebody being forced into the  
24 commission of a crime?

25 A. I believe that's the area you are referring

1 to, that's what I was referring to, if someone was being  
2 forced into becoming involved in this.

3 Q. Okay. And under those circumstances you would  
4 be inclined to not consider a death penalty. That's what I  
5 didn't understand.

6 A. I would say that would be correct.

7 Q. Okay. Well, now, then, I must tell you that  
8 if someone was forced into committing whatever acts were  
9 involved in the capital murder, they wouldn't be guilty at  
10 all, because that would be duress. So I need to kind of  
11 backtrack a little bit. We're going to be talking here  
12 about somebody who didn't have the defense of being forced  
13 into doing it. We don't prosecute people who don't have a  
14 choice about doing things. So --

15 A. I -- actually, that's why I made that  
16 statement, because I was not using any of what this  
17 particular case had involved.

18 Q. Okay.

19 A. We're looking at this as a blank scenario.

20 Q. Right. Okay. And I'm using that as -- I  
21 don't like using examples because people think that they're  
22 being asked that fact situation when really we're asking  
23 this in the rare ether of a hypothetical situation. So in a  
24 hypothetical case where someone has been convicted of the  
25 offense of capital murder -- and you now know that that is a

1 life sentence and not a death sentence?

2 A. Yes.

3 Q. And we're talking about here in a hypothetical  
4 case where someone is an accomplice to the death penalty, I  
5 mean, to the capital murder.

6 A. Yes.

7 Q. What are your thoughts on applying or  
8 administering a death verdict to an accomplice under those  
9 circumstances?

10 A. I would have to say I would be in favor of  
11 that because he would have been receiving the good side, if  
12 there is such a good side, of the benefits of what they were  
13 doing.

14 Q. Okay. Okay. So I guess --

15 A. Now, as I said, it wasn't a good side, there's  
16 no good side to that.

17 Q. No.

18 A. But in their rationale thinking.

19 Q. Okay. So what I hear you saying, that in your  
20 feelings on the death penalty and participation in a capital  
21 murder are strong enough that in reality you really favor a  
22 death sentence over a life sentence?

23 A. I probably would in situations where there has  
24 been a life taken.

25 Q. Okay. Fair enough. You get to say what you



1 think in this situation. And let me hark back to that a  
2 minute, because when you were speaking with Mr. Wirskye  
3 about this probability issue, and you said -- you said,  
4 well, hypothetically, but not in this case. Have you had  
5 some thoughts about the future dangerousness in the case at  
6 hand?

7 A. Future dangerousness as far as --

8 Q. In this particular case?

9 A. -- danger to whom?

10 Q. Well, as it is expressed in Special Issue No.  
11 1.

12 A. Well, I would say that there is, I mean, I  
13 haven't sat and thought about it a lot.

14 Q. I'm sure.

15 A. I think there could be a continuing threat, if  
16 someone has been involved in a crime of this nature.

17 Q. Okay. You have made some comments to  
18 Mr. Wirskye about, well, maybe not in this case, but as a  
19 theoretical. What were you referring to there?

20 A. And, again, we're in a theoretical situation,  
21 I'm not referring to anything in particular. It would have  
22 to be proven to me beyond a reasonable doubt that everything  
23 that was being charged was convincing to me and it would  
24 depend on that particular court.

25 Q. Okay. Well, this is where we get out of the

1 theoretical and we're talking about this case, because it's  
2 no secret. And we've talked to all jurors about things that  
3 they have heard about the events that transpired in this  
4 case. And I'm asking you now, specifically in this case, do  
5 you think that you have formed an opinion as to the future  
6 dangerousness in this case?

7 A. I would say I possibly have formed a further  
8 continuous danger issue in this particular case.

9 Q. Okay. Could you explain that a little bit  
10 more for me, what you mean by that?

11 A. Well, what I'm saying is apparently the  
12 gentleman was in prison and broke out. And then went on out  
13 and performed another act that caused other deaths.

14 Q. Right. And now -- so in this case you think  
15 that there's Special Issue No. 1 is probably going to be  
16 answered yes for you?

17 A. Yes.

18 Q. Okay. And, you know, you just tell us what  
19 you think. There's no right or wrong answer. Is that an  
20 opinion that you have formed, just based on what you have  
21 heard from the media?

22 A. I think it's in reading Special Issues, just  
23 as the verbiage that's there. Not necessarily looking at  
24 this particular case, in those situations I think I would  
25 make the decision predicated on what I was led to form my

1 opinion from here in the court.

2 Q. Okay. Well, but I'm asking about this  
3 particular case.

4 A. Okay.

5 Q. You said that you think you have formed an  
6 opinion about this case. Is that because of what you have  
7 heard in the past or what you know about this case?

8 A. I'd say it's what I feel has happened in this  
9 situation.

10 Q. Okay. It's not -- there's nothing wrong with  
11 that. I'm just trying to get you to tell me what you -- how  
12 you feel based on what you know, now that you know that this  
13 question is one of the questions you'd be asked. If you  
14 could tell me that.

15 A. I feel personally in a situation pertaining to  
16 this particular case, that the person involved, if proven  
17 beyond a reasonable doubt of guilt, then it would be in the  
18 best interest of the United States of America, Texas, and  
19 all of us around, for him not to have the opportunity of  
20 continuing out the possibility of getting back out in the  
21 outside world.

22 Q. Which, I think you're saying that means that  
23 you would be inclined to vote for a death sentence in that  
24 case?

25 MR. WIRSKYE: Judge, I'm going to object.

1 He said based upon proof beyond a reasonable doubt. Shows  
2 he can follow the law. I think it's misleading to the  
3 juror.

4 THE COURT: Well, rephrase your question.  
5 I sustain the objection.

6 Q. (By Ms. Busbee) Okay. I don't even remember  
7 what my question was before I was interrupted. Do you  
8 remember what it was? I asked you if, no, I remember what  
9 you said to me, and that's what prompted me to ask that.  
10 You said that based on what you know already about this case  
11 that you felt like the proper verdict would be death. Does  
12 that, paraphrased, is that what you were telling me?

13 A. I'm saying in any situation right now, if I  
14 was involved in any litigation where someone had been  
15 involved in the act of murder, I would be -- it would be my  
16 recommendation that a death penalty would take place, yeah.

17 Q. Okay. So -- and your feelings I'm hearing  
18 from you are very strong about assessing the death penalty  
19 where a murder has occurred?

20 A. If it is proven beyond a reasonable doubt with  
21 the evidence in the court, then I would go to the full  
22 extent of the law.

23 Q. Okay. And while these Special Issues are  
24 required to be answered in these cases, your feelings are  
25 strong enough that we'd actually have to convince you not to

1 give death, as opposed to the State having to convince you  
2 to give --

3 A. No, that's not what I'm saying. I'm saying  
4 the 'defense side -- the prosecution side of it has to prove  
5 to me that all of this stuff did happen.

6 Q. Right.

7 A. And if all of this stuff did happen, then I  
8 would propose the maximum sentence that the person could  
9 get.

10 Q. Okay. Well, and that's where I'm taking you.  
11 I'm dragging you past. You've already found someone guilty  
12 of capital murder.

13 A. Okay.

14 Q. Really, your feelings for the death penalty  
15 are these Special Issues that the Legislature wrote are  
16 fine, but your feeling is that death is an appropriate  
17 punishment?

18 A. No, I -- well, I think we go back to question  
19 No. 2, or whatever that was, where we get the attorney  
20 situation opinions. No. I think there probably are  
21 situations possible that I would not automatically impose a  
22 death sentence. But in certain situations, I think we have  
23 to justifiably take some actions so this stuff doesn't  
24 continue happening.

25 Q. Okay. Fair enough. Well, the way it's set up

1 is, it's an automatic life sentence.

2 A. Yes.

3 Q. But you're telling me in your gut it's an  
4 automatic death sentence, and you would need to be convinced  
5 that a life sentence is appropriate instead of --

6 A. I don't believe I said that. If I did, I  
7 apologize. I said if it's proved to me beyond a reasonable  
8 doubt in that court, then I would go for the maximum  
9 sentence.

10 Q. Okay. That's where we're having the problem.  
11 You are saying, if he was proved to be guilty?

12 A. Yes.

13 Q. Okay. I'm asking you after a person has been  
14 proved guilty.

15 A. Okay. After he's proven guilty --

16 Q. What are your feelings?

17 A. I would just as soon -- we didn't have to put  
18 people to death, but I don't know how we can get around it  
19 right now. I think there are probably some circumstances,  
20 he's been proven guilty, that he did something not  
21 necessarily involved in this, but he did have mental  
22 retardation or didn't have the brains of a six year old,  
23 then I possibly would have compassion from that standpoint.

24 Q. Okay.

25 A. Does that answer --

1 Q. Well, no, because you are skipping to Special  
2 Issue No. 3.

3 A. Okay.

4 Q. What I think you're telling me is, I mean, in  
5 as plain a language as you can, that once you have found  
6 somebody guilty of the offense of capital murder, you have  
7 already decided that they are going to be a future threat  
8 without having to hear or consider anything, other than that  
9 they're guilty. And the anticipation of a human life, that  
10 question, I think you told us if the other -- if you are  
11 with some people and that happens, that's -- you should have  
12 known better, to paraphrase what you've said.

13 These are questions that the law requires  
14 a jury to consider, but you've said every time, I think, to  
15 me, and if it's your opinion, that's fine, that that doesn't  
16 really matter to you, that you favor a death sentence over a  
17 life sentence?

18 A. I don't believe I said that. I said, I wish  
19 we didn't have to put people to death. But there are  
20 mitigating circumstances, whatever you want to refer to them  
21 as, especially in a situation where they had already been  
22 incarcerated, broke out of jail and went and killed  
23 somebody. If we want to look at the exact case, then I  
24 would have to look at it as the most penalty they can get.

25 Q. Okay. So in this particular case you've

1 formed an opinion that the death penalty would be the proper  
2 punishment?

3 A. I don't really -- have an exact statement  
4 made. You are wanting me to make one. But I haven't gone  
5 through -- you are telling me he's guilty, okay --

6 Q. Yeah, but after finding --

7 A. -- or you are making the assumption that he is  
8 guilty and that these gentlemen have proved that point to me  
9 beyond a reasonable doubt. And if they have done their job  
10 --

11 Q. Yes, sir.

12 A. -- and proved to me beyond a reasonable doubt  
13 that all of the stuff that they said happened, happened,  
14 then I would be in favor of the death penalty.

15 Q. Okay. Irrespective of the other questions  
16 that have to be answered?

17 A. Exactly.

18 Q. Okay. So in this particular case you are  
19 saying that if the defendant was found guilty, was proved to  
20 you beyond a reasonable doubt to be guilty of the offense of  
21 capital murder, that you have formed an opinion that the  
22 correct punishment would be death?

23 A. I would say the maximum punishment that is  
24 applicable would be what I would vote for. And at this  
25 particular situation, apparently, it is death.



1 Q. Okay. Because there are just two options.

2 A. Correct. Either life in prison or death.

3 Q. Okay. And I think that you are being frank.

4 That's just your opinion, even though the law says that  
5 there are some additional steps that should be gone through.

6 A. Maybe I'm not aware of the additional steps  
7 that should be gone through, if we have already established  
8 the case is over and the gentleman or lady has been proved  
9 beyond a reasonable doubt that is guilty, and the situation  
10 being a scenario as we're talking about it, there was an act  
11 that took a police officer or a fireman or somebody else in  
12 prison, as I'm understanding it, then they would be, maximum  
13 penalty would be death. And I think that's the way it  
14 should be.

15 Q. Okay. All right. Now, directing your  
16 attention to these Special Issues.

17 A. Okay.

18 Q. Is your opinion so strong that the State  
19 wouldn't have to prove to you beyond a reasonable doubt in  
20 this case that there was a probability of future acts of  
21 violence or would that already be decided for you in this  
22 case?

23 A. I'm sorry, would you repeat that question?

24 Q. Would you, directing you to Special Issue No.  
25 1, in this case have you already formed an opinion as to --

1 after the person has been found guilty, we ask you this  
2 after a finding of guilty.

3 A. Okay.

4 Q. Have you already formed an opinion that in  
5 this case the defendant is likely to commit criminal acts of  
6 violence that would constitute a continuing threat to  
7 society?

8 A. If we're assuming that the case is complete --

9 Q. Yes, sir.

10 A. -- and they have proved to me beyond a  
11 reasonable doubt that he did do what was charged, I must say  
12 I probably have got a preprejudiced decision, because they  
13 -- I don't have a preprejudiced decision until they have  
14 proved it, but you are asking me to assume that they have  
15 already done their job.

16 Q. Right. Because there's two parts. They have  
17 to prove him guilty.

18 A. Okay.

19 Q. And he's guilty of capital murder beyond a  
20 reasonable doubt when we come back to you with Special Issue  
21 No. 1. And that's what I thought you said, originally, was  
22 in this case you already feel that that is yes, that he is a  
23 continuing threat.

24 A. I don't believe I said that and I'm not sure.  
25 I think I said that once the court case came through without

1 a reasonable doubt in my mind at all, that this did happen,  
2 then I would be in favor of the death penalty.

3 Q. Okay. And it wouldn't matter to you. That's  
4 what I'm saying. Guilty is already done. Guilty is a done  
5 deal.

6 A. Okay.

7 Q. Okay. If a person has been found guilty  
8 beyond a reasonable doubt of capital murder, Special Issue  
9 No. 1 has been decided in your mind as yes?

10 A. As he would be a potential harm to other  
11 people around him, and my answer, again, if we're assuming  
12 all these other things, I'm assuming I would make my answer  
13 then yes.

14 Q. Okay. Well, now, in that situation, would I  
15 have to prove to you something to answer that question no?  
16 Would there be anything that could be in your mind make you  
17 answer that question no?

18 A. If the Court has already proved beyond a  
19 reasonable doubt that everything is yes, my answer would  
20 have to be yes.

21 Q. Okay. I'm not talking about -- I'm talking  
22 about the second part, not the first part. You have already  
23 found the person guilty.

24 A. Right.

25 Q. And now we're answering these questions yes or

1 no.

2 A. Okay.

3 Q. If you found him guilty on Special Issue No. 1

4 --

5 A. Yes.

6 Q. Have you -- in your mind is that already a yes  
7 answer because they were guilty of the offense of capital  
8 murder?

9 A. My answer would be yes, if we're into yes or  
10 no's.

11 Q. All right. Yes, sir. Yes or no, that's what  
12 I thought you were saying. The law says that they have to  
13 prove that to you beyond a reasonable doubt and it's no, but  
14 I think what you are telling me is if you found someone  
15 guilty of the offense of capital murder, that answer is yes.  
16 And particularly in this case that you have an opinion that  
17 the answer would be yes. We can't ask you these questions  
18 in between the guilt part and the punishment part is why we  
19 kind of have to ask you now.

20 A. Well, that's why -- that's what -- I was  
21 trying to answer your question. If one side has already  
22 proved beyond a reasonable doubt that it did happen and  
23 everything that the witnesses brought up were true and it  
24 did happen and everything else, I would have to say in  
25 Special Issue No. 2 that I would believe the death penalty

1 would be the appropriate sentence.

2 Q. Okay. So someone who is guilty of capital  
3 murder in your mind, you've already decided that they're a  
4 continuing threat to society?

5 A. No, ma'am. You asked me to assume that this  
6 particular case, they had proved it to me.

7 Q. Right, but --

8 A. I am not saying in every case, if someone has  
9 committed murder, that it's automatically a death sentence.

10 Q. Sir, my question is if you found him guilty of  
11 the offense of capital murder, capital murder, guilty --

12 A. Yes.

13 Q. -- and then you are saying guilty, but I'm  
14 saying on Special Issue, would you automatically answer that  
15 yes?

16 A. I am saying I would automatically answer that  
17 question yes, if it had already been proved beyond a  
18 reasonable doubt.

19 Q. The guilt?

20 A. The guilt.

21 Q. Okay, but --

22 A. The punishment phase of it would automatically  
23 go for the maximum sentence, from my opinion.

24 Q. Okay. Fair enough. So even though the law  
25 says life, your real feelings are such that you couldn't

1 really consider a life sentence or consider answering  
2 Special Issue 1 or 2 no. In order to effect a life sentence  
3 we'd have to -- we over here would have to change your mind  
4 in some form or fashion?

5 A. If this side had already proved to me during  
6 that process that everything is done, there really isn't a  
7 whole lot, I guess, this side could do to convince me not  
8 to.

9 Q. Okay. Well, I'm trying to save you from  
10 getting batted back and forth by the tangled lawyers, but --

11 A. Okay.

12 Q. You are saying if he's guilty, punishment is a  
13 foregone conclusion?

14 A. Foregone conclusion, if he's guilty. His  
15 conclusion automatically is life in prison, correct?

16 Q. Yes.

17 A. Okay. I would rather instead, in this  
18 particular situation, instead of him staying in prison for  
19 life, which apparently is forty consecutive calendar years,  
20 I would rather not have him be a threat to other inmates  
21 sitting in the Texas prison system until the year 2050.

22 Q. Okay. I appreciate that. So you are saying  
23 in this case you have predecided or have an opinion that the  
24 -- if he's guilty beyond a reasonable doubt, he should  
25 receive the death penalty? Is that, again, I'm trying to

1 save you from being batted back and forth.

2 A. Well, I don't think you are saving me from  
3 that. But if we have gone through the whole judicial  
4 process and we've gotten to the point that the person is  
5 automatically everything guaranteed, proven guilty, and his  
6 minimum sentence is life imprisonment for forty calendar  
7 years, I would rather propose the death sentence than the  
8 forty calendar years.

9 Q. Right. So are you telling us you have --  
10 these Special Issues are -- now that you understand, but in  
11 this instance you wouldn't follow them. You've already  
12 decided that death would be the proper punishment?

13 A. I haven't made any predisposed decisions when  
14 I walked in here. We have made me make assumptions. They  
15 haven't even proved to me that the gentleman did it yet.

16 Q. Okay. But I have to take you to that point,  
17 because I can't --

18 A. If you take me to that point --

19 Q. Right.

20 Q. -- and they've done their job and they've  
21 proved it to me, I would rather not have the gentleman  
22 sitting in the prison system for forty calendar years.

23 Q. Okay. So in this particular case you are just  
24 saying you couldn't really be fair to the defendant and  
25 follow this particular law because you would prefer that a

1 death sentence over a life sentence?

2 A. Yes.

3 Q. Okay. And while you might be a perfectly good  
4 juror on a case, another capital murder case, in this case  
5 you have an opinion as to what the proper punishment should  
6 be?

7 A. I don't believe I'm actually saying that. I  
8 believe you are asking me to assume --

9 Q. That he's guilty.

10 A. -- that all this stuff is true --

11 Q. Well, that's right, because I'm asking --

12 A. See, if I go through the fantasy process that  
13 you are asking me to go through, and these gentlemen have  
14 proved to me beyond a reasonable doubt --

15 Q. And I am -- I'm way past you found him guilty.  
16 That's where we are now. And if you found him guilty --

17 MR. SHOOK: Judge, my objection is the  
18 way these questions are being asked is she has him assume  
19 all the facts of this case and give his personal opinions,  
20 and then tries to disqualify him in general.

21 MS. BUSBEE: Well, I've asked it two  
22 different ways in general and I am entitled to ask if he's  
23 got an opinion and I believe he's expressed it, Your Honor.

24 MR. SHOOK: By assuming that all these  
25 facts are true of specific facts.



1 MS. BUSBEE: Well, he's seen the  
2 indictment, he knows that the charge is.

3 MR. SHOOK: But the way the questions are  
4 asked, what are your personal opinions --

5 MS. BUSBEE: Can we retire the juror for  
6 this conversation, if it's going to be --

7 THE COURT: I believe that would probably  
8 be the best thing to do. Mr. Campbell, would you be so kind  
9 as to wait for us outside?

10 [Prospective juror out]

11 MR. WIRSKYE: Judge, our argument is that  
12 you can't ask the juror to assume everything they think  
13 about this case is true, then ask them if they have an  
14 opinion about it, then turn around and disqualify them  
15 because they have an opinion about this case. It's  
16 circular. You've asked them to assume it's all true.

17 MS. BUSBEE: No. Well, what he does, I  
18 cannot control. But, Your Honor, what I've asked him is in  
19 this case would he give effect to these Special Issues, and  
20 he's told us 82 different ways if he finds someone guilty in  
21 this case, he wants to give a death sentence. I can't see  
22 how he could be less qualified.

23 THE COURT: Mr. Shook? Mr. Wirskye?

24 MR. WIRSKYE: Like the juror last week,  
25 that's confusing guilt with our getting through all this.

1 MS. BUSBEE: Well, I explained --

2 MR. WIRSKYE: He's prefacing everything  
3 on --

4 MS. BUSBEE: Oh, he understands it, he  
5 says the same thing once you --

6 MR. SHOOK: If you'll recall, the way the  
7 defense counsel went into this, it starts asking we just  
8 want your opinions on what you remember about this case and  
9 the punishment, then we can talk real generally about the  
10 law. And then all of a sudden you start plugging the two  
11 in. He thinks she wants to know all about his opinions on  
12 the case and how he's going to answer the questions. And he  
13 says, assuming all that is true, then I guess it'd be a yes.  
14 She can get his personal opinions all she wants, and, you  
15 know, if he's saying on his personal opinions on the facts  
16 that I know and they've been described in this case, if you  
17 want, and he even said that once, how I would answer on this  
18 case? Well, from the facts I know, yeah, I would answer  
19 that first one yes, or it would be a death penalty.

20 THE COURT: Mr. Shook, understanding  
21 sometimes people's perceptions are a function of how they  
22 perceive things, as well as what they anticipate they  
23 perceive. And he's just as much of a tangler in this mess  
24 as the lawyers are. I certainly understand where the State  
25 is coming from, but I made my own notes. Even on the

1 State's direct, I noted there was a bias leaning toward the  
2 defense before they even got started on it.

3 MR. SHOOK: Okay. Well, that's fine.

4 THE COURT: The bottom line is that in  
5 measuring him against the other people we've talked to and  
6 qualified, he's not even close.

7 MR. SHOOK: That's fine, Judge. But a  
8 while back I objected when she started asking about personal  
9 opinions. And she said, I just want to know his personal  
10 opinions, and that's fine. But then if you come back and  
11 then try to cause people on that, I have a problem with  
12 that.

13 THE COURT: I'm not going to go there  
14 because he was close just on direct. And I have to measure  
15 him by the other folks.

16 MR. SHOOK: Yeah, I understand why you  
17 ruled on this particular juror, although it would be nice to  
18 have Jack Nicholson on the jury.

19 MS. BUSBEE: He thinks he's Jack  
20 Nicholson.

21 THE COURT: I can see that. But, no, I  
22 certainly understand where the State is coming from, and I'm  
23 not going to let the defense bait the trap on opinion to  
24 cause a qualification issue. So do you wish to agree or do  
25 you wish me to find him not qualified?

1 MR. SHOOK: Oh, we can agree to it.

2 MS. BUSBEE: We agree. We're all just  
3 sweetness and light now.

4 THE COURT: Would you ask Mr. Campbell to  
5 come back in?

6 [Prospective juror out]

7 THE COURT: Mr. Campbell, thanks so much  
8 for coming down. I have some news for you. You will be  
9 able to sit on your boat. You're not going to be a juror on  
10 this case.

11 PROSPECTIVE JUROR: Okay.

12 THE COURT: Thank you, sir.

13 [End of Volume]  
14  
15  
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17  
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24  
25


1 STATE OF TEXAS \*

2 COUNTY OF DALLAS \*

3 I, NANCY BREWER, Official Court Reporter for the 283rd  
4 Judicial District Court, do hereby certify that the above  
5 and foregoing constitutes a true and correct transcription  
6 of all portions of evidence and other proceedings requested  
7 in writing by counsel for the parties to be included in this  
8 volume of the Reporter's Record, in the above-styled and  
9 numbered cause, all of which occurred in open court or in  
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 2004.

13  
14  
15   
16 NANCY BREWER, CSR, NO. 5759  
17 Expiration Date: 12-31-04  
18 Official Reporter, 283rd JDC  
19 Frank Crowley Crts. Bldg. LB33  
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REPORTER'S RECORD

VOLUME 36 OF 41 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS \* IN THE DISTRICT COURT  
VS. \* DALLAS COUNTY, TEXAS  
PATRICK HENRY MURPHY, JR. \* 283RD DISTRICT COURT

\*\*\*\*\*

INDIVIDUAL VOIR DIRE

\*\*\*\*\*

**FILED IN**  
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 14th day of October, 2003, the following  
proceedings came on to be heard in the above-entitled and  
numbered cause before the Honorable Vickers L. Cunningham,  
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

**ORIGINAL**

A P P E A R A N C E S

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PROSPECTIVE JUROR INDEX

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P R O C E E D I N G S

THE COURT: Ready for Ms. Ellis.

[Prospective juror in]

THE COURT: Be seated. Good morning.

PROSPECTIVE JUROR: Good morning.

THE COURT: How are you? We have juror  
No. 4803, Deloris Ellis; is that correct?

PROSPECTIVE JUROR: Yes.

THE COURT: Ms. Ellis, welcome to the  
283rd. Looks like you are a little nervous this morning.

PROSPECTIVE JUROR: Yes.

THE COURT: It's okay. Most people are a  
little nervous coming in because you have never been through  
a process like this before.

PROSPECTIVE JUROR: No.

THE COURT: The best thing about it is  
there are no wrong answers. No wrong answers at all. Did  
you have enough time this morning to go through the guide I  
provided for you?

PROSPECTIVE JUROR: Yes.

THE COURT: And also a copy of your  
questionnaire?

PROSPECTIVE JUROR: Yes.

THE COURT: I did that so you can refresh  
your memory and begin to think about the issues that we're

1 going to be dealing with and review your answers. The  
2 attorneys may want you to explain an answer or expand upon  
3 an answer that you gave us back in May. The whole process  
4 here is designed to have you gain a working knowledge of the  
5 law. We want you to be able to understand and work the law  
6 in this case. Ask questions. That's what this is all  
7 about.

8 The only thing I'm going to be able to  
9 ask you at this point is will you be able to serve this  
10 Court for a period of two weeks beginning on November 10th?

11 PROSPECTIVE JUROR: Yes.

12 THE COURT: At the end of the process I  
13 will have two questions for you that I have to answer  
14 myself. Number one is, do you, in fact, understand the law?  
15 And, number two, can you follow the law? That's the big  
16 picture I have to have. Fair enough?

17 PROSPECTIVE JUROR: Okay.

18 THE COURT: Mr. Shook, would you like to  
19 inquire?

20 MR. SHOOK: Yes, Judge.

21 DELORIS ELLIS,  
22 having been duly sworn, was examined and testified as  
23 follows:

24 DIRECT EXAMINATION

25 BY MR. SHOOK:

1 Q. Ms. Ellis, my name is Toby Shook. I'm going  
2 to be asking questions on behalf of the State this morning,  
3 and as the Judge says, there aren't any right or wrong  
4 answers. We just want your honest opinions.

5 A. Okay.

6 Q. I'll follow up on some of the information on  
7 your questionnaire and then we'll talk about the capital  
8 murder death penalty and how you feel about that. Okay?

9 A. Okay.

10 Q. Now, on the questionnaire you said you worked  
11 at GMAC; is that right?

12 A. Yes.

13 Q. What do you do with them?

14 A. I work in the accounting department. I  
15 handle, like, suspended payments.

16 Q. Okay. And have you ever been down on a jury  
17 before?

18 A. Yes.

19 Q. What type of case did you serve on?

20 A. Um, it was a murder case.

21 Q. Okay. Do you recall about how long ago that  
22 was?

23 A. Um, it's been about ten years.

24 Q. Okay. I notice in your questionnaire you said  
25 something about a murder case involving a teenager that was

1 shot. The question we asked, was there anything that upset  
2 you about your prior jury service, and was that -- the  
3 victim of the crime was a teenager?

4 A. Yes. It was just a little much for me, a  
5 little disturbing. It was real intense.

6 Q. Okay. Pretty intense jury?

7 A. (Prospective juror nods head.)

8 Q. Do you remember what the sentence was?

9 A. I believe he got 99 years.

10 Q. Okay. What do you remember about the facts?

11 A. Um, um, according to like what they talked  
12 about in the case?

13 Q. Yes, ma'am.

14 A. Just the pictures that they showed of the  
15 incident.

16 Q. Of the body and things like that?

17 A. Yes.

18 Q. Was it pretty upsetting to you?

19 A. Yes, it was a little much.

20 Q. Okay. Obviously, you don't get to choose what  
21 type of juries you come down on. You have been down on a  
22 murder case already. And now with this one you find out you  
23 are on a capital murder case, which involves another death.  
24 And oftentimes, you know, there's, obviously, a lot of  
25 graphic photos, a death involved, that sort of thing.

1 Do you think from the experience you have  
2 had previously that that might, might affect you or may  
3 bother you to sit on another case similar in nature?

4 A. Yes.

5 Q. Is it something that you don't feel you can go  
6 through again?

7 A. No.

8 Q. You are pretty positive about that?

9 A. Yes.

10 Q. Okay.

11 MR. SHOOK: Your Honor, I believe that's  
12 all the questions we have then.

13 MS. BUSBEE: We've reached an agreement  
14 on this juror, Your Honor.

15 THE COURT: Ms. Ellis, you can reduce  
16 your stress level a little bit. They have agreed to excuse  
17 you.

18 PROSPECTIVE JUROR: Okay.

19 THE COURT: Okay? Thank you so much.  
20 You are free to go.

21 PROSPECTIVE JUROR: Thank you.

22 [Prospective juror out]

23 THE COURT: Mr. Becher.

24 [Prospective juror in]

25 THE COURT: Good morning, sir. We have

1 juror No. 4424, Mr. Timothy D. Becher; is that pronounced  
2 correctly?

3 PROSPECTIVE JUROR: Becher.

4 THE COURT: Becher. Good morning,  
5 Mr. Becher. Welcome to the 283rd. Did you have an  
6 opportunity to read the guide I provided for you this  
7 morning?

8 PROSPECTIVE JUROR: Yes, I did.

9 THE COURT: I also gave you a copy of  
10 your questionnaire that you filled out for us back in May so  
11 you can begin to think about some of the issues that the  
12 attorneys will discuss with you. This process is designed  
13 to provide you with a working knowledge and understanding of  
14 the law that we're dealing with in this case. Please ask  
15 questions. That's how you will learn.

16 If I recall, I e-mailed -- you were in  
17 London last week; is that correct? That's why we had to  
18 reschedule you backwards to get you here.

19 PROSPECTIVE JUROR: Yes, that's correct.

20 THE COURT: That's all I remember is why  
21 you are out of order. And will you be able to serve this  
22 Court for a period of two weeks beginning on November 10th?

23 PROSPECTIVE JUROR: Yes, I will.

24 THE COURT: I didn't know if your travel  
25 schedule would allow that. Good. Have you recovered from

1 your jet lag?

2 PROSPECTIVE JUROR: No, I'm still  
3 recovering.

4 THE COURT: It's what, three o'clock in  
5 the afternoon for you, isn't it?

6 PROSPECTIVE JUROR: That's right.

7 THE COURT: You should be up bright and  
8 early this morning ready to go. I appreciate you coming in  
9 right after a return from London. If you would, at the end  
10 of the process I have two questions I must ask. Number one  
11 is, in fact, do you understand the law? And, number two,  
12 can you follow the law? That's the big picture I have for  
13 you. So with that I will turn it over to Mr. Wirskye. You  
14 may inquire.

15 MR. WIRSKYE: May it please the Court?

16 TIMOTHY BECHER,  
17 having been duly sworn, was examined and testified as  
18 follows:

19 DIRECT EXAMINATION

20 BY MR. WIRSKYE:

21 Q. Mr. Becher, how are you this morning?

22 A. Good.

23 Q. My name is Bill Wirskye and I'll be the  
24 Assistant DA that will be visiting with you for the next few  
25 minutes. What I'd like to do is follow up on some of the

1 information in your questionnaire, talk to you a little bit  
2 about your thoughts and feelings about the death penalty,  
3 and then, finally, talk to you about some of the rules and  
4 laws that apply in a case like this where the State is  
5 seeking the death penalty. Were you in London for business  
6 or pleasure?

7 A. Business.

8 Q. Okay. And you are an auditor; is that right?

9 A. That's correct.

10 Q. Okay. What do you do kind of on a day-in,  
11 day-out basis?

12 A. Well, we have some legislation that was passed  
13 last year and being an international company, I have to  
14 travel to all of our subsidiaries and make sure that they  
15 are in compliance with that new legislation.

16 Q. Okay. Do you travel quite a bit?

17 A. Quite a bit, about forty percent of the time.

18 Q. Okay. But with enough notice I guess you can  
19 serve as a juror for those two weeks, if you needed to in  
20 November?

21 A. Yes. That wouldn't be a problem.

22 Q. Okay. And you are originally from California;  
23 is that right?

24 A. Well, I was born in Los Angeles, but I moved  
25 to New Mexico when I was 3. So I don't remember very much



1 about it.

2 Q. Okay. How long have you been in Texas?

3 A. Two and a half years.

4 Q. Okay. What do you think about Texas so far?

5 A. I like it. I can do without the humidity, but  
6 I enjoy it for the most part.

7 Q. Wait until you get a little bit older. It  
8 gets tougher. Let's see. You told us generally you are in  
9 favor of the death penalty; is that right?

10 A. That's correct.

11 Q. Okay. Why do you think we should have the  
12 death penalty or what purpose do you think the death penalty  
13 serves in our society?

14 A. I think it's a deterrent to commit murder. I  
15 think that that's the only way that you can -- I think if  
16 you kill someone, then you should be put to death, if you  
17 are convicted of that crime.

18 Q. Okay. Did you get a chance to read the packet  
19 that the Judge provided for you?

20 A. Yes, I did.

21 Q. Some of the law? Just generally, and I think  
22 this surprises a lot of people, at least in Texas the death  
23 penalty is only available for certain types of murder cases.  
24 It's always got to be an intentional murder plus some other  
25 aggravating factor. There are a lot of very brutal and very

1 bad murder cases that, because they don't fit into that  
2 criteria, the death penalty is simply not an option. You  
3 can get up to life in prison, but the death penalty would  
4 never be on the table.

5 I know that surprises a lot of people, or  
6 a lot of people, personally in their opinion, they would  
7 have that death penalty option available for any murder  
8 case. And that kind of sounds like where you're at; is that  
9 right?

10 A. Um, I think I would probably be in agreement  
11 with the laws of Texas. I think if you kill someone in  
12 self-defense, I think there would have to be special  
13 circumstances to warrant the death penalty.

14 Q. Basically, just to touch on self-defense, when  
15 you are talking about capital murder, it's always the taking  
16 of a life without legal justification or excuse. It's not  
17 self-defense. If you kill someone in self-defense, you  
18 would be guilty of no crime. Or if you kill somebody  
19 accidentally, you would be guilty of no crime. So it's  
20 always that intentional taking of a life without legal  
21 justification or excuse.

22 When you are talking about the types of  
23 cases where you can have the death penalty, if you kill a  
24 certain person like a police officer, fireman, or prison  
25 guard on duty, if you kill a child under six, if you commit

1 a murder during the course of another felony, like robbery,  
2 rape, or burglary, mass murder, serial murders, those type  
3 things. Those are the type cases that we just reserve for  
4 consideration for the death penalty. And it sounds like  
5 that's kind of what you are in agreement with, right?

6 A. Yes.

7 Q. But just to let you know the self-defense  
8 scenario, or the accident scenario, is just simply not an  
9 issue, usually, in a capital murder case.

10 A. Okay.

11 Q. And we ask people always to kind of rank  
12 themselves on a scale of 1 to 10 that if they are in favor  
13 of the death penalty, how strongly they are in favor of it.  
14 And I think you gave yourself an 8. And I know that means  
15 different things to different people. And I was just kind  
16 of curious what that meant to you.

17 A. I don't believe that a life sentence is  
18 justified in the case of capital murder. I think if you  
19 take the life of someone without provocation for your own  
20 purposes, then I think you should be put to death. I don't  
21 -- I just don't see how you can kill someone under certain  
22 circumstances and be sentenced to life in prison. I don't  
23 -- I just don't think that's fair.

24 Q. Okay. And we talk to a lot of people that  
25 that's their personal opinion. I'll be up front with you.

1 That's not the law. Just to, again, give you kind of a  
2 brief overview of capital murder and how it works in Texas,  
3 you have got to have one of those particular cases, you  
4 know, murder of a certain person, murder under certain  
5 circumstances, to get to capital murder. If a person is  
6 found guilty of that capital murder, then there's a whole  
7 second phase of the trial, the sentencing phase.

8 And that's where we ask a jury to answer  
9 these three questions, and they are up on the wall there.  
10 You may have gotten a chance to look at them. And,  
11 basically, what we do is we don't ask a jury to write in a  
12 life sentence or a death sentence. What we ask the jury to  
13 do is answer these three questions and depending on the  
14 answers to those questions, that determines whether the  
15 person gets that life sentence or gets a death sentence.

16 One way to look at it is, if you are  
17 convicted of capital murder, one of those murders under a  
18 special circumstance, if you are convicted in the first  
19 phase, you are, basically, sitting on a life sentence at  
20 that point. Okay? The only way you get to a death penalty  
21 at that point during that second phase of the trial are if  
22 these questions are answered in such a way that the death  
23 sentence would be automatic. Does that make sense to you?

24 A. Yes.

25 Q. And I know a lot of people feel if you have

1 been convicted of capital murder, death is always the  
2 appropriate sentence. But that's just not the law in Texas.  
3 You know, we have to -- we ask a jury to answer these  
4 Special Issues. It's, basically, kind of a set of filters  
5 to make sure that those people that are convicted of capital  
6 murder and actually get death are the people that really  
7 deserve it. Does that kind of make sense to you?

8 A. Yes, sir.

9 Q. Is that a law you think you could follow?

10 A. Yes.

11 Q. Okay. Despite your personal opinions, you  
12 think you could, I guess, exercise the mental discipline and  
13 work through these questions?

14 A. Yes.

15 Q. Okay. Because we don't want people, very  
16 frankly, who, if they convict someone of capital murder,  
17 they just kind of disregard or blow off the evidence in the  
18 second phase of the trial and just answer these questions in  
19 such a way to ensure a death sentence. We really want  
20 jurors to kind of work through the issues.

21 A. Understood.

22 Q. Is that something you think you could do?

23 A. Yes, I could.

24 Q. Okay. When you think about an appropriate  
25 type, just again, your own personal opinion, not what the

1 law is, but your own personal opinion, when you think of an  
2 appropriate type of case for the death penalty, is there a  
3 particular case that comes to mind?

4 A. Um, I think probably rape if that -- I would  
5 say if getting into specifics, if I were with my wife and we  
6 were carjacked or somebody put us in a situation where the  
7 perpetrator just wanted to rape my wife and he had to kill  
8 me to do that, I think that person would definitely be or  
9 should be put to death.

10 Q. Okay.

11 A. I think if a person breaks into a house with  
12 the intent to steal something for their own benefit and they  
13 automatically go to the master bedroom and kill the people  
14 in the house just to take the property, I think that would  
15 warrant the death penalty.

16 Q. Right. I think both of those circumstances  
17 you described would probably qualify as capital murder in  
18 Texas. I noticed in your questionnaire you also mentioned,  
19 I guess, the sniper case, the D.C. snipers, I guess, Malvo,  
20 and I can't remember the other guy's name, but --

21 A. Yeah. I think there's no, absolutely no  
22 reason for them to kill without provocation. I would think  
23 that the death penalty would be -- well, I would probably be  
24 on the fence with that one.

25 Q. Why is that?

1           A.       I don't understand their motivations for  
2     killing, and -- but from where I'm sitting, if you kill that  
3     many people with no motivation, I would think that that  
4     would probably be appropriate. I would have to learn more  
5     about the case, probably, before I can make that decision.

6           Q.       Kind of thinking about that sniper case, let  
7     me touch on another issue that we talk to every juror about,  
8     and that's, basically, the law of parties we call it in  
9     Texas. It deal with accomplices, okay? When more than one  
10    person commits a crime. Kind of like you had in the sniper  
11    situation.

12                   The law says if more than one person  
13    commits a crime, they can all be prosecuted for that crime  
14    as long as everyone is actively involved. When you are  
15    talking about a capital murder type scenario, you may have a  
16    situation where just one of the people is the actual  
17    shooter, you know, the triggerman. Only one person actually  
18    caused the death.

19                   You may have other accomplices who  
20    actively participate in that capital murder, but,  
21    nevertheless, they didn't actually cause the death. Some  
22    people who are very strongly in favor of the death penalty  
23    tend to draw some lines sometimes. And what I mean by that  
24    is they would only reserve the death penalty just for the  
25    triggerman.

1                   You know, they may feel very strongly for  
2 the guy that actually caused the death. But if it were up  
3 to them, when it comes to the accomplices, they would simply  
4 take the death penalty off the table, and the death penalty  
5 wouldn't be an option for the accomplices. Other people we  
6 talk to kind of feel differently. They say, you know, it  
7 depends on the facts and circumstances. I'd have to know  
8 the facts before, you know, I could consider the death  
9 penalty for an accomplice. Where do you come down on that  
10 issue?

11           A.       I would have to know the facts. I think if  
12 you -- well, that's a pretty difficult issue. I think if  
13 there are two people that are going to commit a robbery and  
14 they go in with the intent to murder the store clerk and  
15 just one of them does it and the other one takes the money  
16 from the register, then I would think if they had that  
17 mindset going in, then they would definitely both be liable  
18 for that death, I think.

19           Q.       Okay. So you can see the death penalty in  
20 that case for the person that didn't actually pull the  
21 trigger?

22           A.       Yes, I could.

23           Q.       Okay. I guess it's kind of like the sniper  
24 case where I guess the older guy directed the young guy to  
25 actually pull the trigger, that type thing?



1           A.       You know, I would definitely like to see all  
2       of those, the issues, and all the facts that would come out  
3       before I would make a consideration like that, but I think  
4       it all comes down to the intent. If they went into a  
5       situation with the intent to kill and both parties knew that  
6       that was the goal, that was what they wanted to do, then I  
7       would think both parties would be liable.

8           Q.       Okay. And, we know, we talk to so many people  
9       that intent is very important. Let me follow up on your  
10      example real quick and just to show you kind of how the law  
11      of parties operates in Texas.

12                   Let's say Mr. Shook and I decide we're  
13      going to rob that bank, and we get together. Our plan is  
14      just to rob the bank, okay? The plan is he's going to go in  
15      with the gun. He's going to hold up the tellers. I'm going  
16      to go in unarmed and I'm just going to clear out the money  
17      drawers while he holds everyone at bay. Okay? And that's  
18      our plan. That's what I sign up for.

19                   During the course of that robbery, let's  
20      say Mr. Shook decides to shoot and kill one of the tellers.  
21      Maybe one of them looks at him funny or, you know, he sees  
22      somebody going for a silent alarm or I tell him somebody is  
23      going for a silent alarm, nevertheless, he shoots and kills  
24      someone. He commits an intentional murder during the course  
25      of a robbery. He can be convicted of capital murder. He

1 could face the death penalty depending on the answers to  
2 these questions.

3 And the law says, depending on the facts  
4 and circumstances, I could, too, be convicted of capital  
5 murder and potentially face the death penalty, even though  
6 in my example I never had any intent, you know, for him to  
7 pull that trigger. You know, I just signed up for the bank  
8 robbery. And, again, some people view that scenario a  
9 little bit differently because the accomplice doesn't have  
10 the intent, you know. What do you think of that situation?

11 A. I could definitely see the death penalty for  
12 the shooter. I would be on the fence for the accomplice.  
13 I'm not sure if, um, if that was a reaction of one person  
14 and I don't know if I could hold the accomplice liable for  
15 that.

16 Q. What would be important to you, thinking  
17 through that scenario? Any particular facts or factors when  
18 you are talking about giving me, the accomplice, the death  
19 penalty?

20 A. I would go -- that's a tough question. I  
21 think if you go in with the intent that if somebody foils  
22 our plan and we have to kill someone, then so be it. We're  
23 going to accomplish what we need to accomplish and take this  
24 money, then I would probably consider it for you. But if it  
25 so happened that everything went crazy, the situation, and

1 Mr. Shook shot and then both ran, I would have to look very  
2 carefully at all of those facts. I don't -- I would say  
3 that I would probably not be in favor for you, if you didn't  
4 actually pull the trigger.

5 Q. Okay. What the law says is a person can be  
6 convicted, an accomplice like me, who didn't have the intent  
7 that a death happen, but they can be convicted and face the  
8 death penalty, if the jury thinks that I should have  
9 anticipated that a death would happen. You know, by the  
10 fact that we went in armed or he went in armed during that  
11 bank robbery.

12 You know, it could even be a situation  
13 where we get in there and, you know, I'm begging him not to  
14 shoot, you know, but he does it anyway. If the jury thinks  
15 that I should have anticipated that a life would be taken,  
16 then I could potentially face the death penalty. What do  
17 you think about that?

18 A. I agree with that.

19 Q. Okay.

20 A. If, yeah, that's, if you should have  
21 anticipated it, then I would probably say that you would be  
22 liable for the death penalty.

23 Q. Okay. And that's what a lot of people tell  
24 us. Maybe, you know, the fact that he carried a loaded gun  
25 to a bank robbery, the accomplice maybe should have

1 anticipated.

2 A. Yeah.

3 Q. In fact, before we can get to the death  
4 penalty the law says not only, you know, the jury has to  
5 find that I should have anticipated, but did I actually  
6 anticipate? And that's kind of the law before we get to the  
7 death penalty.

8 A. Okay.

9 Q. Any questions about those kind of scenarios,  
10 those accomplice scenarios?

11 A. No.

12 Q. And the reason I touch on them at length is,  
13 to be very honest with you, that's the theory of law we're  
14 prosecuting this case under, is an accomplice. And that's  
15 why it's so important for us to find out what people really  
16 think about that and whether they're comfortable following  
17 the law as it is in Texas with that "should have  
18 anticipated." Is that something that you are comfortable  
19 with?

20 A. Yes.

21 Q. Okay. Mr. Becher, like everybody we talked to  
22 just about, you've indicated that you've heard something  
23 about this case or know something of the facts through the  
24 media, that type thing. Can you tell us what you remember  
25 hearing about this case?

1           A.       Um, seven inmates, they escaped from prison  
2     and then to, I guess, finance their travels or whatever,  
3     they went into an Oshman's in Irving and they were  
4     interrupted by an officer that was called to the scene and  
5     when he got there shots were fired into his car and he was  
6     killed, then he was ran over, I guess, to make sure that he  
7     was dead.

8                         And then they went with the money that  
9     they obtained from the robbery and then, I think they also  
10    robbed a Radio Shack where no one was killed, and then went  
11    to Colorado and they were at a trailer park and they were --  
12    stayed there for a few weeks, I believe. And then they were  
13    discovered and six of them -- six were apprehended and one  
14    took his own life.

15          Q.       Okay. Is this something that you got through  
16    the newspaper or watching TV or documentary or --

17          A.       The newspaper and Internet.

18          Q.       Okay. Is it something, anything that you have  
19    looked at recently or is this something back from the time  
20    it happened, or --

21          A.       I did look at the case a little bit more  
22    closely after I was called in for the jury duty.

23          Q.       Sure.

24          A.       I just pulled up some information on the  
25    Internet to look at.

1 Q. Did you become aware of any of the results of  
2 any other court proceedings or cases regarding this case?

3 A. I know that Mr. Rivas was found as the  
4 ringleader. He was found guilty of capital murder and  
5 sentenced to death.

6 Q. Okay. You know, we always ask people and we  
7 kind of rely on each juror to kind of really be honest with  
8 us. It's kind of an unusual case because most criminal  
9 cases we try down here people come in with absolutely no  
10 knowledge of the case. They have no idea what the case is  
11 going to be until they get in the jury box.

12 Obviously, on a high profile case like  
13 this people have heard different amounts of things. Sounds  
14 like you have a pretty good detailed grasp of the facts. So  
15 we just kind of rely on people to kind of tell us how they  
16 think that may affect them, if they were selected as a juror  
17 in this case, knowing what you know.

18 A. Um, I think that I would wait until I was in  
19 discovery of all of the facts before I could make any  
20 decisions. I know that there's been a lot of media  
21 coverage, but I don't think that I would be influenced by  
22 that at all. I mean, being an auditor, I like to look at  
23 all of the evidence right in front of me before I make any  
24 determination.

25 Q. What the law is, you know, you are not

1 automatically disqualified just because you have heard about  
2 the case. You know, if that were the case, we would never  
3 get a jury in high profile cases. But the law requires that  
4 if you are going to be a juror on the case, regardless of  
5 what you have heard or any opinions or conclusions you may  
6 have formed, as long as you can put that to the back of your  
7 mind.

8           You know, we can't ask you to forget it,  
9 obviously, but put it to the back of your mind and be able  
10 to tell us that you can base your verdict just on the facts  
11 and the evidence you hear in the courtroom and not anything  
12 you may have heard outside or previously. As long as you  
13 could do that, you could be a qualified juror. Is that  
14 something you think you can do?

15           A.       Yes.

16           Q.       Okay. You know, a lot of people, I guess,  
17 philosophically or in the abstract are in favor of the death  
18 penalty. Sometimes when people come down here it affects  
19 them a little differently, because the whole process becomes  
20 a little more real. You're in a courtroom looking at  
21 lawyers, looking at the person down at the end of the table,  
22 knowing, very frankly, it's our goal that, you know, he be  
23 found guilty of capital murder because we believe we have  
24 the evidence, and that one day, you know, not to put too  
25 fine a point on it, but one day he'd actually be executed

1 and be lying dead on a gurney in Huntsville, Texas.

2 But I think to a lot of people when they  
3 get to this point in the process, you know, even though they  
4 are philosophically in favor of the death penalty, they are  
5 not completely comfortable or they have some hesitation  
6 about potentially participating in the process, being one of  
7 the jurors to make those life and death decisions.

8 And we always ask people if they think  
9 they are the type person that could make those decisions  
10 and, again, we rely just on you and knowing yourself like  
11 you do. But do you think you are the type person that could  
12 take pen in hand and answer these three questions in such a  
13 way that it may ultimately result in the execution of  
14 another human being?

15 A. Yes, I could.

16 Q. Okay. Why do you say that?

17 A. I believe in our justice system and I believe  
18 that death penalty is appropriate in some cases, and I'm,  
19 obviously, not familiar with the law where it's warranted,  
20 but I think that our government has a good system of  
21 following the steps, discovering the facts, to see if a  
22 person should be put to death. And I'm in favor of the  
23 death penalty and I would not have a problem going through  
24 that process, evaluating all the evidence.

25 Q. Okay. Fair enough. I don't want you to think



1 that, you know, almost everybody that walks in here unless  
2 they're a lawyer or does what we do for a living, most  
3 people don't know what the scheme is in Texas and how it  
4 works or what particular crimes it is available for. So  
5 don't feel bad about that at all. And we know everybody  
6 comes with different opinions and different thoughts in  
7 their own personal life.

8 And it's fine to have whatever feelings,  
9 thoughts, or opinions you have in your personal life. The  
10 bottom line is always going to be, regardless of those  
11 opinions, can you set them aside and follow the law that we  
12 have in Texas. And that's, like I said, is the ultimate  
13 question for everything we talk about, so.

14 Let's take a second and talk about these  
15 three Special Issues. Again, these are the questions that  
16 would determine whether that person gets the life sentence  
17 or whether they actually get the death sentence and this  
18 would be during the second phase of the trial, the  
19 sentencing phase, after you have already found somebody  
20 guilty of capital murder.

21 The law requires that you start that  
22 sentencing phase with an open mind, you know, no automatic  
23 answers just because you found someone guilty of capital  
24 murder. You listen to the extra evidence that you get to  
25 hear in sentencing, background evidence, reputation,

1 criminal history, that type stuff, both good and bad, if it  
2 exists.

3 And we let you listen to that type of  
4 information to help you answer these three questions.

5 Is that scheme kind of making sense now, the way we have it?

6 A. Yes.

7 Q. Okay. Take a moment or two and just read  
8 through those three questions and we'll kind of run through  
9 them and talk about each one of them.

10 A. Okay.

11 Q. Again, those are the three questions that we  
12 ask the jury to answer at the end of the process. Again,  
13 one way to look at it, if you've convicted someone of  
14 capital murder, they are sitting on a life sentence. The  
15 only way to get to the death penalty is if these questions  
16 are answered in a certain way.

17 And, again, the law contemplates that a  
18 juror be able to start that second phase of the trial with  
19 an open mind. Sometimes we run into people that tell us,  
20 you know, very frankly, Mr. Wirskey, you know, if I found  
21 somebody guilty of a capital murder, when I look at Special  
22 Issue No. 1, that talks about whether they are going to be  
23 that continuing threat to society, just because I found him  
24 guilty of capital murder, I'm always going to answer that  
25 question yes. Okay? I'm always going to think every

1 capital murderer is going to constitute a continuing threat  
2 to society.

3 If you feel that way, that's fine. You  
4 just wouldn't be qualified, because the law requires that  
5 jurors be able to keep that open mind when they start out.  
6 No preconceived notions of doing anything automatically.  
7 Does that make sense to you?

8 A. Yes.

9 Q. Okay. Special Issue No. 1, again, talks about  
10 that continuing threat to society. There's some terms and  
11 words and phrases in there that aren't necessarily defined  
12 legally. The law kind of allows jurors just to use their  
13 own good common sense and definitions of words.

14 We always ask every juror kind of to  
15 define some words for us just so we can get a feel for where  
16 you are coming from. That word "probability" that you see  
17 in the first question, what does that mean to you,  
18 "probability"?

19 A. Good chance, if I think it will happen again,  
20 most likely.

21 Q. More likely than not?

22 A. Right.

23 Q. A likelihood?

24 A. Right.

25 Q. That's typically what people tell us. It's,

1 obviously, something short of a certainty, because, you  
2 know, you could never be certain about anything in the  
3 future.

4 A. Right.

5 Q. And something less than that and something  
6 more than a mere possibility, because anything could be  
7 possible, that type thing. When you see that phrase in the  
8 middle line "criminal acts of violence", what type of crimes  
9 or what type of acts come to mind when you look at that?

10 A. Murder, burglary, violence, I think of  
11 assault.

12 Q. That's typically what people tell us,  
13 assaultive type crimes or crimes that involve the threat of  
14 violence, that type thing. Is that something you're  
15 comfortable with?

16 A. Yes.

17 Q. Okay. And then, finally, that word in there,  
18 "society." What does that mean to you or how would you  
19 define society?

20 A. Society, I would think of members that are  
21 contributing to the economy, you and I working every day to  
22 try and make money for our family.

23 Q. Okay. Would you limit it just to include  
24 those people that are not locked up? Or would you, you  
25 know, kind of expand it to include those people behind bars?

1 A. Yeah, I would.

2 Q. You know, other prisoners, guards, wardens,  
3 that type of thing?

4 A. Yes.

5 Q. Everyone and anyone he may come into contact  
6 with?

7 A. Yes.

8 Q. Okay. Do you see how that question kind of  
9 asks a juror to make a prediction about the future?

10 A. Uh-huh.

11 Q. Is that something that you are comfortable  
12 doing?

13 A. Yes.

14 Q. Okay. What type of information do you think  
15 would be important to you in answering that question?

16 A. Um, I would think probably background, prior  
17 incidents, criminal record.

18 Q. Okay. Look for a pattern, that type of thing?

19 A. Right. And I would, also, look at the case  
20 itself. I mean, obviously, it doesn't apply in this case,  
21 but if there were a case where an individual committed one  
22 act of murder where they were completely wronged and there  
23 were special circumstances why they committed the murder --

24 Q. Sure.

25 A. -- they didn't have a history of burglary.

1 Q. See, let me tell you two things. I want you  
2 to realize, very frankly, we're not talking -- we're talking  
3 about a hypothetical capital murder case. I know you may  
4 know a little bit of the facts of this case. But we're  
5 always talking in the hypothetical.

6 A. Okay.

7 Q. I'm not asking you to answer these three  
8 questions based on what you know about this case.

9 A. Okay.

10 Q. You know we talked about how the law kind of  
11 requires you to keep that open mind? Just because you have  
12 convicted someone of capital murder, you don't automatically  
13 answer that question without looking at the evidence. Kind  
14 of, I think an example you were going towards.

15 You know, say, I come home and find out  
16 my neighbor's done something awful to my little daughter,  
17 you know, sexually abused her. I think about it overnight.  
18 The next day, get up, go kick in his door, commit burglary,  
19 and kill him, because I don't think the police are going to  
20 do anything about it.

21 I've committed capital murder during a  
22 burglary. I could be convicted of it, but a jury may think  
23 I'm never going to be a future danger, that type thing.

24 A. Right.

25 Q. And it's those type of -- because, you know,

1 we can't get into the facts of this case. We're always  
2 talking hypothetically. But I think that is why the law  
3 contemplates that everybody be able to keep that open mind  
4 and not answer anything automatically or prejudge before  
5 they've heard all the evidence. Does that make sense to  
6 you?

7 A. Yes.

8 Q. Okay. Special Issue 1, one last point about  
9 it. It starts off with a no answer, okay? That's kind of  
10 the default setting for that question. It's part of our  
11 burden of proof to prove to you as a juror that the answer  
12 should be yes. Okay? We've got to prove he's guilty of  
13 capital murder and we've got to prove to you the answer to  
14 No. 1 should be yes.

15 And No. 2 is the exact same way. We've  
16 got to prove that that answer should be yes as well. That  
17 starts off with a no. It's our burden of proof to prove it  
18 to you yes. Does that make sense?

19 A. Yes.

20 Q. If we don't bring you that evidence or if you  
21 don't think we've met that burden, then the answer stays no.  
22 And, very frankly, the effect of answering either of those  
23 no would be a life sentence. We wouldn't be able to get to  
24 that death penalty. Does that make sense to you?

25 A. Yes.

1 Q. Even somebody such as yourself that believes  
2 strongly in the death penalty, do you see how if you really,  
3 you know, are conscientious and work through these  
4 questions, that somebody could end up with a life sentence?

5 A. Yes.

6 Q. Okay. Moving on to Special Issue No. 2, it  
7 starts off with that no answer. This is the question that  
8 deals with that kind of accomplice scenario that we've  
9 already talked about. If you think the person actually  
10 caused the death of the deceased, you'd answer it yes. If  
11 you didn't think they actually caused it, but they intended  
12 to kill the deceased or another, you would answer yes.  
13 Maybe that sniper type scenario where somebody is directing  
14 another to kill.

15 A. Right.

16 Q. Obviously, they had the intent, but they  
17 didn't actually pull the trigger. Or, very finally, the  
18 last line, anticipated that a human life would be taken. We  
19 kind of already touched on that, but I want to go back over  
20 it one more time.

21 In order to convict an accomplice of  
22 capital murder, like me in our example, the jury would have  
23 to find that I should have anticipated that a life would be  
24 taken. Okay? When we get to the punishment phase in the  
25 questions, the law imposes a little bit higher standard on



1 us before we can get to the death penalty. We have to prove  
2 to a jury that he actually anticipated, that he did  
3 anticipate a life would be taken. And sometimes it's a fine  
4 distinction. Do you see the distinction between "should  
5 have" and "did"?

6 A. Yes.

7 Q. One thing I think of -- and I tell people  
8 sometimes, when I was 16 my dad gave me a car. And I didn't  
9 know what I was doing at 16 and I drove it crazy like a, you  
10 know, a madman. And after about a month I wrecked it out.  
11 My dad came back to me and he was very angry and said, you  
12 know, you such and such, you should have anticipated if you  
13 drove like that you were going to wreck that car out.

14 And he's right, I should have. But I  
15 didn't actually anticipate. I was too young and too dumb at  
16 the time. So I think that's a good example between should  
17 have and did. Does that make sense to you?

18 A. Yes.

19 Q. Okay. And, again, you may go back and look at  
20 the evidence you heard in the first part of the crime to  
21 help you answer that question. You may find out about his  
22 past history in the second phase of the trial to help you  
23 answer that anticipation question.

24 You know, obviously, we can't pull off  
25 the top of someone's head and climb in and see, you know,

1 what they actually anticipated. We just kind of have to  
2 look at the facts and the acts that people did and draw  
3 conclusions or inferences from that to determine that  
4 anticipation. Does that make sense to you?

5 A. Yes, it does.

6 Q. Okay. Is that something you think you could  
7 do?

8 A. Yes.

9 Q. Okay. Some people tell us, you know, to  
10 answer that question I would have to hear from the  
11 defendant, you know. I'd have to hear what he actually  
12 anticipated. The problem with that is the defendant always  
13 has a Fifth Amendment right not to testify in his own  
14 defense. We'll talk about that more in a minute.

15 But do you think that you are comfortable  
16 answering that question without him testifying and just  
17 looking at the facts of the crime and the facts of the  
18 person and their background?

19 A. Yes.

20 Q. Okay. Again, those two questions 1 and 2  
21 start off with a no. We've got to prove it to you. If we  
22 don't meet our burden of proof, you've got to keep it yes,  
23 or keep it no. And, again, the practical affect of that is  
24 the person gets a life sentence rather than a death  
25 sentence. If both 1 and 2 are answered yes, then you move

1 to Special Issue No. 3.

2 That's kind of the last stop in the  
3 process. This is what we call the mitigation question.  
4 Some people think of it as a jury's chance to show mercy  
5 based on the facts, if they think it's appropriate. We ask  
6 a juror to kind of step back, take a deep breath, look at  
7 all the facts and evidence they have heard in both phases of  
8 the trial, and see if there's anything that is mitigating.

9 And by mitigating we mean something that  
10 kind of lessens a person's personal blame for what happened,  
11 okay? Kind of the opposite of aggravating is mitigating.  
12 And we ask a juror is there anything there, is there  
13 anything that lessens that moral blame, and if there is, is  
14 it sufficient that his life ought to be spared, that he  
15 should be given that life sentence and not a death sentence.  
16 Does that make sense to you?

17 A. Yes.

18 Q. Okay. Do you see the value in having that  
19 type of question, you know, and kind of the jury's chance to  
20 show mercy based on the facts?

21 A. Yes.

22 Q. Okay. Because some people tell us, you know,  
23 if I'm this far in the process, if I found somebody guilty  
24 of capital murder, if I found they were a future threat to  
25 society, and at the very least they anticipated that a life

1 would be taken, my mind is closed at that point. There  
2 could never, ever be anything mitigating in my mind.

3 And they tell us that question has no  
4 value for them. If you feel that way, that's fine. You  
5 just simply wouldn't be a qualified juror. But based on  
6 what you have told us, you do kind of see the value in that  
7 question; is that right?

8 A. Yes. I think that if, once again, looking at  
9 past experience and if there were certain incidents that  
10 occurred in childhood that would have a really bad effect on  
11 someone, and maybe that would be where I would consider  
12 insanity, if they were considered insane by --

13 Q. Okay. Let me just stop you there real quick  
14 and clear up one point. And most people are not aware of  
15 this. If a person is legally judged insane, we wouldn't be  
16 in this case.

17 A. Okay. Understood.

18 Q. The person wouldn't know the difference  
19 between right and wrong, and at that point, you know, they  
20 wouldn't be held responsible in this sort of way. Does that  
21 make sense?

22 A. Yes.

23 Q. But I know you expressed some concern in your  
24 questionnaire, kind of what you talked about a person's  
25 upbringing. And a lot of people tell us that. They say,

1 you know, it may be potentially mitigating if a person had,  
2 you know, a bad childhood, was physically, emotionally  
3 abused as a child, a bad environment, that type thing. I  
4 would consider that to be maybe potentially mitigating,  
5 depending on the other facts. That's kind of what I hear  
6 you saying; is that right?

7 A. Yes.

8 Q. Okay. Anything else you can think of that  
9 might be potentially mitigating?

10 A. Um, to use your example, if someone murdered  
11 my wife, I mean, after they sexually assaulted her, then I  
12 would consider that, well, this individual hasn't performed  
13 murders in the past, they've never had a criminal record,  
14 and they, you know, performed this one act of murder, then I  
15 would say maybe that would be mitigating circumstances.

16 Q. Something that's just totally out of  
17 character, based on their past history?

18 A. Right.

19 Q. Sure. The evidence may actually come from our  
20 evidence. This question is a little bit different. Neither  
21 side has the burden of proof. It doesn't start off with a  
22 no answer. We just rely on the jurors to answer it as they  
23 see fit.

24 You know, again, we're always talking  
25 about hypotheticals and giving examples, but, you know,

1 maybe a circumstance where somebody commits a capital murder  
2 and they instantly feel remorseful. They pick up the phone  
3 and call 911 or try to give CPR to the victim before they  
4 die. You know, that type of thing. That may be mitigating.  
5 Does that make sense to you?

6 A. Yes.

7 Q. It may come from the State's evidence as well.  
8 The law doesn't require that you consider anything, any  
9 particular factor, mitigating. We just leave it up to you.  
10 You don't even have to agree with the other jurors what you  
11 think is mitigating, as long as you can tell us that you  
12 have that open mind this late in the process, and if you  
13 hear something mitigating, you will consider it. As long as  
14 you do that, you would be a qualified juror. It sounds like  
15 that's something you can do?

16 A. Yes.

17 Q. Any questions about this scheme? Because I  
18 know, you know, just from talking to you these last few  
19 minutes and talking to -- doing this day in and day out,  
20 most people don't realize kind of how the scheme works. But  
21 any questions about it?

22 A. No, I understand it.

23 Q. Okay. They may be answered at the end of all  
24 the evidence in both phases of the trial. And that's why  
25 it's important, I guess, that we don't go on with those

1 preconceived notions, but do you see how a person that is  
2 maybe strongly in favor of the death penalty like you are  
3 for capital crimes could actually end up giving a life  
4 sentence, you know, based on the facts and answering these  
5 questions?

6 A. Yes.

7 Q. Okay. Let's talk a little bit about some of  
8 the general rules that apply in any criminal case. We have  
9 kind of touched on a lot of these already. You may remember  
10 them from school.

11 The burden of proof is always on this  
12 table. We have to bring you evidence to prove to you beyond  
13 a reasonable doubt that the person is guilty of capital  
14 murder, that the answer to 1 and 2 should be yes. You can  
15 never look at these guys to bring you anything or require  
16 them to bring you anything.

17 Legally they can sit there and do  
18 crossword puzzles the whole trial and never ask a question.  
19 It's not going to happen. They are good lawyers. But it  
20 kind of illustrates the point that you've always got to look  
21 here for the burden of proof.

22 A. Right.

23 Q. As a part of that the person is presumed  
24 innocent. As we sit here right now, he's presumed innocent.  
25 The only way we -- he is found guilty is if we bring you

1 proof beyond a reasonable doubt and that's when that  
2 presumption of innocence disappears. Does that make sense  
3 to you?

4 A. Yes.

5 Q. Again, the Fifth Amendment, no one can force  
6 him to testify. If he wants to testify, no one can keep him  
7 from testifying. If he doesn't testify, the Judge would  
8 tell you, you just simply couldn't consider it. It's a  
9 nonfactor. You couldn't hold it as a circumstance against  
10 him because there may be very many, you know, quite a few  
11 reasons why he may not testify.

12 He may not be a good public speaker. He  
13 may be guilty. He may be relying on his lawyer's advice who  
14 told him to stay off the stand. Because there's so many  
15 reasons, you just can't consider it or hold it against him,  
16 if he doesn't testify. Does that make sense to you?

17 A. Yes.

18 Q. Okay. Did you get a chance to look at our  
19 indictment? I think it's in the back on the last page in  
20 the booklet. See where it says indictment?

21 A. I didn't look at the last page.

22 Q. The back of the last page. True Bill of  
23 Indictment.

24 A. Oh, okay.

25 Q. That's what we call the charging instrument.



1 That's what we write as DA's where we allege what we think  
2 happened in the crime. And that's, basically, what we have  
3 to prove in order to get a guilty in the case.

4 Those crimes kind of break down into  
5 different elements. Okay? As part of our burden of proof,  
6 the law requires that we prove to you each and every element  
7 of the crime that we've alleged beyond a reasonable doubt.  
8 You know, we can't, we don't get partial credit. We can't  
9 go nine for ten or eight for ten. We've got to hit them  
10 all. If we alleged it, we've got to prove it.

11 The law says one element is no more  
12 important than another element. Okay? Obviously, one  
13 element of a crime is proving we've got the right person,  
14 the person's identity. If you had a reasonable doubt that  
15 we proved that element to you, you would be required to find  
16 that person not guilty. Okay?

17 Kind of an extreme example of how that  
18 works is another element of every crime is the county in  
19 which the crime happened. Okay? In this case we have  
20 alleged Dallas County. Say in a hypothetical murder case we  
21 alleged Dallas County. We don't do our jobs. We don't do  
22 our homework. The proof comes out at trial that it actually  
23 happened in Tarrant County, across the border.

24 You are convinced the guy did the murder.  
25 You're convinced he's good for it. But we just messed up.

1 We got the wrong county. We didn't prove what we alleged in  
2 our indictment. You'd have a reasonable doubt about an  
3 element. The law would require you to find the person not  
4 guilty.

5 You may not like it. You may find it  
6 distasteful. You may think it's a technicality. But that's  
7 kind of the mental discipline that the law requires of  
8 jurors. Is that something you think you could do?

9 A. Yes.

10 Q. Okay. Or, you know, one of the elements that  
11 we allege is the manner and means in which the crime was  
12 committed. We may allege a person was shot to death with a  
13 gun. It turns out the medical examiner says he was actually  
14 stabbed to death.

15 You may have no doubt about any other  
16 element of the crime, but if we didn't get that element  
17 right, you would have to find the person not guilty and very  
18 simply we just wouldn't be doing our jobs. You can go up  
19 and get us fired, you know, that day. But is that a law you  
20 think you could follow?

21 A. Yes.

22 Q. Okay. Let's talk a little bit about the  
23 witnesses that you may hear from. You probably imagine in a  
24 criminal case that you are going to hear from police  
25 officers. The law says that you've got to initially treat

1 police officer witnesses just like any other witness.

2                   You have to start them out at that same  
3 level of credibility. You can't give them an automatic leg  
4 up, just because they walk in carrying a badge and a gun.  
5 You've got to listen to what they say to see if they're  
6 credible or not. You can't give them that automatic head  
7 start. Is that something you think you could do?

8           A.       Yes.

9           Q.       Okay. Sometimes in these cases during the  
10 punishment phase with these issues you may hear from a  
11 psychiatrist or a psychologist to try to help you answer  
12 maybe Special Issue 1, the future danger question, or  
13 Special Issue 3, the mitigation question. So we're always  
14 curious to kind of get people's gut reaction to those type  
15 witnesses in these cases, you know, expert witnesses. What  
16 would you think of that type of testimony, those expert  
17 witnesses, psychologists or psychiatrists?

18           A.       I would -- I would consider it. I mean, I  
19 would definitely listen to what was said about a credible,  
20 someone that I would consider a credible witness, if they  
21 were to say that there were definitely instances of abuse  
22 that may have led to this behavior, something like that. I  
23 would consider that.

24           Q.       Okay. And that's, basically, what the law  
25 requires, again, that you keep that open mind. Sometimes we

1 have people that would never believe them. They think, you  
2 know, you can find an expert witness, if you look hard  
3 enough and pay them enough money to come in here and say  
4 whatever you want. Maybe they don't believe in psychology  
5 or psychiatry, think it's a soft science.

6 At the other end of the spectrum you may  
7 have people that believe too much in them. They think  
8 they're all geniuses and every word out of their mouth is  
9 golden. We're just kind of looking for those people in the  
10 middle. That kind of sounds like where you're at?

11 A. Yes. I would definitely take it under  
12 consideration and consider the credibility of the witness.

13 Q. We've talked, again, the two possible  
14 punishments for capital murder in Texas, that life sentence  
15 or the death sentence, if we work through these questions in  
16 the proper way. There is no life without parole in Texas.  
17 So let me talk to you a little bit about the parole laws and  
18 how that affects this case.

19 A life sentence in this case would mean  
20 that a person would serve 40 calendar years, day for day,  
21 before that person would see a Parole Board, before they  
22 would become eligible for parole, okay? Forty years down  
23 the line they may see that first Parole Board and make  
24 parole. Or they may never make parole and actually serve an  
25 actual life sentence. That kind of make sense to you?

1 A. Yes.

2 Q. Because those decisions are so far in the  
3 future and they are beyond the control of anyone here, the  
4 Judge would instruct you that you just have to consider that  
5 a life sentence actually means a life sentence when you are  
6 deliberating. Does that make sense to you?

7 A. Yes.

8 Q. Is that something you think you could do?

9 A. Yes.

10 Q. Okay. Another thing that may come up, I don't  
11 know if it will, but I need to talk to you about it before  
12 we wrap up, are these things called lesser included  
13 offenses, okay? Lesser included offenses.

14 Let's say at the first stage of the trial  
15 in a capital murder case, murder during the course of a  
16 robbery, you may have a reasonable doubt about the murder  
17 part. You don't have any doubt that the guy is good for  
18 aggravated or armed robbery. You may have an option of just  
19 finding him guilty of that lesser included offense of  
20 aggravated robbery.

21 If you do that, then you throw this  
22 scheme out the window and the law says that you set  
23 punishment somewhere between five years all the way up to  
24 life in prison. That's the punishment range for aggravated  
25 or armed robbery in Texas. The law requires that you be

1 able to, as you sit there right now, in any hypothetical  
2 aggravated robbery case, that you tell us you can keep an  
3 open mind to the full range of punishment, five years all  
4 the way up to 99 or life. Is that something you think you  
5 could do?

6 A. Yes.

7 Q. Okay. Mr. Becher, we've run over a lot. You  
8 probably feel like you spent a day in law school, probably.  
9 But any questions at all about any of this?

10 A. No.

11 Q. Okay. Again, the bottom line always is can  
12 you follow the law? Can you keep that open mind, regardless  
13 of what your personal thoughts or opinions are? If you can  
14 follow the law and give a fair trial to both sides, you  
15 would be a qualified juror. I appreciate your time. Thank  
16 you.

17 MR. WIRSKYE: That's all I have, Judge.

18 THE COURT: Mr. Sanchez?

19 MR. SANCHEZ: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. SANCHEZ:

22 Q. How are you doing today, Mr. Becher?

23 A. Doing well.

24 Q. Good. Good. I was looking at your  
25 questionnaire. I saw that you grew up in, is it Farmington,

1 is that where --

2 A. Yes.

3 Q. Okay. You lived there most of your life?

4 A. I did, until my sophomore year of high school.

5 Q. Okay. And where did you move after that?

6 A. I moved to Roswell, New Mexico. I was in  
7 military school for my last two years of high school and my  
8 first two years of college.

9 Q. And where did you go to college?

10 A. I went two years at New Mexico Northeast  
11 Institute and then I did two years at New Mexico State in  
12 Las Cruces.

13 Q. Oh, Las Cruces.

14 A. Uh-huh.

15 Q. Is that the Low Bossier or --

16 A. No, that's --

17 Q. Oh, that's A&M, right. Okay.

18 A. Low Bossier, yeah.

19 Q. I know some -- I have some friends from New  
20 Mexico and they went to A&M and actually I have a friend  
21 from Farmington --

22 A. Oh, really?

23 Q. The Briones family. I don't know if you are  
24 familiar with them. Tom Briones, he's a little older than  
25 you are.

1 A. No, I'm not familiar with them.

2 Q. I think his father at one time was some kind  
3 of state representative from that area, or senator, I don't  
4 know what he was, but he was involved in politics up there.

5 A. Okay.

6 Q. I don't think Farmington is as big as Dallas,  
7 so that's why I asked, if maybe you knew them. But I think  
8 they're much older than you are. They're family attorneys  
9 up there.

10 A. I'm not familiar with the name.

11 Q. Okay. And I was wanting to know where you  
12 went to school, because I know the Judge is real interested  
13 in that with a lot of people. So before he asked you, I  
14 thought I'd ask. Okay?

15 What did you think when Mr. Wirskye here  
16 explained to you how this death penalty scheme works? Were  
17 you a little surprised or --

18 A. Um, I wouldn't say I was surprised. I would  
19 say I was informed. I mean, I didn't know a lot about the  
20 process, so I definitely learned. I think it's a good  
21 process to follow.

22 Q. You're like 99.9 percent of the people that  
23 come in here. I mean, we'd be a little leery if somebody  
24 came in and had studied this and knew it before they walked  
25 in here. But, you know, some people come in here and they



1 have strong feelings about the death penalty and then  
2 they're surprised that if someone is convicted of capital  
3 murder, that it's not an automatic death sentence. What do  
4 you think about that?

5 A. I think that it's a good process that we have  
6 in place to follow --

7 Q. Can you see how --

8 A. -- and there are things to consider.

9 Q. I'm sorry?

10 A. That's okay.

11 Q. I didn't mean to talk over you. But can you  
12 see how, you know, the law basically favors a life sentence?  
13 And even if you find somebody guilty of capital murder, a  
14 life sentence is what they would get, unless the State can  
15 jump over these hurdles or meet their burden on these  
16 questions. Can you see that?

17 A. Yes.

18 Q. Okay. And would you have a problem following  
19 a scheme like that?

20 A. No.

21 Q. Okay. I know you said that you could take pen  
22 in hand and participate in a process that would end up in  
23 the death penalty. I just want to make sure from this side  
24 of the table that you would be just as comfortable, if the  
25 State didn't meet their burden on any of these questions and

1 answer them in a way which would result in a life sentence?

2 A. I would be just as comfortable.

3 Q. Okay. Because we've had some people that, you  
4 know, maybe don't want to disappoint the State or, you know,  
5 have some kind of outside influence that would keep them  
6 from answering it that way. And I just want to make sure  
7 that you are the type of juror that wouldn't have a problem  
8 with it.

9 I mean, I know you are an auditor, and  
10 like you said, you know, you don't want to prejudge things.  
11 You want to -- when you audit companies, I'm sure you don't  
12 make assumptions just because they are associated with  
13 another company and how it's going to end up. Would I be  
14 correct in saying that? You are that kind of person?

15 A. Yes. I think it's important to maintain an  
16 attitude of independence and look at all of the facts in  
17 front of you before you make any conclusions or  
18 determinations.

19 Q. And that's what the law requires for you to be  
20 a juror on this case. You would have to not prejudge  
21 anything in this case, and, basically, come in with a blank  
22 slate. I know it's impossible to get rid of things that you  
23 have heard of or seen or known in your life. But you, as a  
24 juror, your sole job is going to be to sit over there,  
25 listen to what the State brings you, and decide whether they

1 have proven their case beyond a reasonable doubt or not. Do  
2 you think you would have any problems doing that?

3 A. No.

4 Q. Okay. Another concept of the law is that --  
5 Mr. Wirskye touched on it and talked a little bit about it,  
6 is that, you know, over here on the defense on behalf of Mr.  
7 Murphy, we don't have to do anything. We don't have to  
8 produce any evidence, we don't have to put on any witnesses.  
9 As a matter of fact, we don't even have to ask any  
10 questions. I anticipate we will, but, I mean, that's just  
11 to point out to you that in order for you to answer those  
12 questions in any way that would favor Mr. Murphy, we don't  
13 have to produce any evidence. What do you think about that?

14 A. I think that's fair.

15 Q. And that's the way it should be done? Is that  
16 what you think?

17 A. Yeah, I agree with that.

18 Q. Okay. Because, you know, we've had some  
19 jurors that come in here and say, well, you know, once I've  
20 convicted somebody of capital murder, in order for me to  
21 answer these Special Issues in any way that would favor Mr.  
22 Murphy or in any way that would end up in a life sentence, I  
23 may need to have some evidence put on by the defense. But  
24 it doesn't sound to me like that's the way you thought or am  
25 -- I correct?

1           A.       That's correct. I don't -- I mean, obviously,  
2 the burden of proof is for the prosecution and that's -- I  
3 understand that.

4           Q.       Okay. And just to explain to you a little bit  
5 how, again, how the process works. Sometimes jurors think  
6 that they answer these Special Issues at the same time they  
7 are answering whether someone is guilty or not of capital  
8 murder.

9                   And the way it really works is you would  
10 sit on the jury. The State would present their evidence in  
11 the guilt/innocence phase of the trial. If you found him  
12 not guilty, if they didn't meet their burden, and you found  
13 him not guilty, then you don't even get to these Special  
14 Issues.

15                   What you would do, you would hear the  
16 evidence, you'd go back in a room, deliberate, decide  
17 whether he's guilty or not guilty of capital murder. That's  
18 all you would decide. Like I said, if you found him not  
19 guilty, that would be the end of it. If you found him  
20 guilty, then the law would require you to come back and  
21 maybe hear more evidence and then consider these Special  
22 Issues separately from your verdict in the first part of the  
23 trial. Does that make sense to you?

24           A.       Yes.

25           Q.       And that's why Mr. Wirskye, when he explained

1 to you that these Special Issues are not to have an  
2 automatic answer, just because you found him guilty of  
3 capital murder. You understand that?

4 A. Yes.

5 Q. What do you think about that?

6 A. I think that's very fair. I mean, going into  
7 it, mitigating circumstances, and if it was an isolated act,  
8 something that was maybe brought on by bad treatment in the  
9 past, I would be able to find mitigating circumstances where  
10 I could say, yes, he's guilty, but he doesn't deserve to  
11 die. I could do that.

12 Q. I just want to make sure that you saw that,  
13 because some jurors say, well, you know, once I found him  
14 guilty of capital murder, I'm just going to -- I'm just  
15 going to go over these Special Issues, but not that well --

16 A. Right.

17 Q. -- you know, I'm just going to steamroll  
18 through them. Because I found him guilty of capital murder,  
19 it's not going to be that hard for me to answer them in a  
20 way that will end up in a death penalty.

21 A. Uh-huh.

22 Q. The law would require you to look at those  
23 Special Issues separately from one another. In other words,  
24 the way you answer one Special Issue shouldn't affect the  
25 way you answer the next one. Does that make sense to you?

1 A. Yes.

2 Q. Well, you know, it sounds to me like you could  
3 be a fair juror, you could give both sides a fair trial.  
4 Just before I stop asking you questions, I just want to say  
5 is there anything that we just haven't asked you the right  
6 way or anything on your mind that you think might keep you  
7 from being fair in this trial?

8 A. No.

9 MR. SANCHEZ: That's all I have, Your  
10 Honor.

11 THE COURT: Thank you, sir. If you would  
12 be so kind and wait for us outside the courtroom and we'll  
13 have you back in just a few moments.

14 [Prospective juror out]

15 THE COURT: What says the State on  
16 Mr. Becher, juror No. 4424?

17 MR. WIRSKYE: State has no challenge for  
18 cause.

19 MR. SANCHEZ: We have no challenge for  
20 cause.

21 THE COURT: All right. Now we've  
22 qualified another juror. Now the issue becomes, I believe  
23 if you'll check your numbers, that he will actually be ahead  
24 of juror No. 12 which we seated yesterday because his number  
25 is -- his number is 4424. He will actually be ahead of

1 juror No. 11 as well.

2 MS. BUSBEE: Well, I know, I thought  
3 about that this morning that he is out of order and we've  
4 already picked our jury. Could we go off the record?

5 THE COURT: Yes, ma'am.

6 [Off the record]

7 THE COURT: All right. Back on the  
8 record. What is the pleasure of the parties with regard to  
9 the order in which this potential person might be seated?

10 MR. WIRSKYE: State has no objection to  
11 seating this juror 1924 as the alternate.

12 MS. BUSBEE: And the defense has no  
13 problem with that, and we would like to do that that way.  
14 May it please the Court.

15 MR. WIRSKYE: The State would as well.

16 THE COURT: So having that issue out of  
17 the way, what says the State as far as accepting this  
18 particular juror?

19 MR. WIRSKYE: The State will happily  
20 accept this juror as an alternate.

21 MR. SANCHEZ: We accept the juror.

22 THE COURT: Once again, I'm not going to  
23 tell him nor should Sheriff Duron tell him that he's an  
24 alternate. He's simply a juror in this case and he'll be  
25 instructed just like everybody else.

1 THE COURT: Have Mr. Becher come back in,  
2 please.

3 [Prospective juror in]

4 THE COURT: Thank you. You may be  
5 seated. Mr. Becher, did I pronounce that correctly?

6 PROSPECTIVE JUROR: Yes.

7 THE COURT: Mr. Becher, I'm going to  
8 inform you that you shall be seated on this jury. It's a  
9 big responsibility. Now, let me give you some very clear  
10 and direct instructions. You have told us here today that  
11 you, in fact, did look at the Internet after the voir dire  
12 back in May.

13 PROSPECTIVE JUROR: Yes.

14 THE COURT: Because you have the  
15 professional discipline and have demonstrated to these  
16 attorneys here today and Mr. Murphy that you have the  
17 discipline to judge this case from the evidence on the  
18 witness stand, you absolutely cannot do any other  
19 independent research or investigation, news articles,  
20 discuss this case with anyone.

21 I mean, I can't make that any more  
22 crystal clear. In fact, I'm going to give you that in a  
23 written order before you leave here today. Now, you,  
24 obviously, will have to inform your employer that you need  
25 two weeks for jury duty. And they probably know why you are



1 here today. What do you think will happen when you go back  
2 and tell them that you are on this case?

3 PROSPECTIVE JUROR: They'll understand.  
4 They'll be fine with it.

5 THE COURT: They'll understand, but they  
6 will be curious and want to offer their opinion as well.  
7 Correct? If you go in and broadcast to the office, I'm a  
8 juror on a capital murder case, then they are going to share  
9 their opinions with you. And the parties are satisfied with  
10 your opinions alone. Follow me?

11 PROSPECTIVE JUROR: Yes, sir, I do. But  
12 I didn't inform anyone at work that I was selected for this  
13 particular case. I was talking about as far as the  
14 responsibility of being away from work for two weeks.  
15 They'll be okay.

16 THE COURT: Good. Then don't inform them  
17 which particular case. Just say I've got jury duty for two  
18 weeks beginning on November 10th. Arrange my schedule  
19 accordingly.

20 PROSPECTIVE JUROR: Okay.

21 THE COURT: And leave it at that.  
22 Because what happens is it invites people to share their  
23 opinions with you. And that's what -- we're trying to shut  
24 that down.

25 PROSPECTIVE JUROR: Okay.

1 THE COURT: As you have said, I will  
2 judge everything about this case from the evidence I hear  
3 from that witness stand that you are in right now.

4 PROSPECTIVE JUROR: (Prospective juror  
5 nods head.)

6 THE COURT: That's as crystal clear as I  
7 can make it.

8 PROSPECTIVE JUROR: (Prospective juror  
9 nods head.)

10 THE COURT: Now, I'm going to provide  
11 those written instructions for you in a minute and also a  
12 supplemental information sheet for the Court. I keep those  
13 records maintained in a digital format and shred them after  
14 we have completed it. So that if I have to make contact  
15 just like I did -- did you get the e-mail when you were in  
16 London?

17 PROSPECTIVE JUROR: Yes.

18 THE COURT: So, I mean, that's how I keep  
19 that information, why I keep that investigation, is to make  
20 contact for some emergency reason.

21 Now, at the time we have this jury  
22 selection completed, I don't know when that will be, we'll  
23 have everybody back in here and probably a week before  
24 November 10th. I don't know exactly what day. I haven't  
25 set it yet because I haven't gotten the jury selected. I'll

1 have everybody back down here for about an hour or hour and  
2 a half worth of additional orientation once we have the  
3 jury. I can't do it until I have everybody here in the box  
4 at the same time.

5 So I'm trying to give you an idea of your  
6 schedule. We'll have one more day down here, just an hour,  
7 hour and a half, and then we will start at 8:30 on Monday  
8 morning, the 10th. If there's any one thing you can count  
9 on, is I'm going to be here on time and I'm going to go to  
10 work. And I've even been accused by the jurors, they say,  
11 please, give us a break, because I am not going to waste  
12 your time.

13 That you can count on, because that's the  
14 number one complaint we have down here. And for years I  
15 have always told jurors, we start here, we take a break, we  
16 have lunch, we have an afternoon break, and we quit at a  
17 reasonable period of time, somewhere between 4:30 and 5:00.

18 If I have a witness who can complete  
19 their testimony and be out of here and we can still leave at  
20 5:00, I'll work past 4:30. I'll balance that one person's  
21 need to finish versus, you know, 15 people that have to wait  
22 with everybody here. So that's what I do.

23 You will not be sequestered during the  
24 trial. You know what that means?

25 PROSPECTIVE JUROR: Sequestered?

1 Questioned?

2 THE COURT: Sequestered.

3 PROSPECTIVE JUROR: No, I'm sorry, I  
4 don't know.

5 THE COURT: You will not be held at a  
6 hotel overnight during the trial.

7 PROSPECTIVE JUROR: Okay.

8 THE COURT: Provided the jury can follow  
9 my written instructions and don't talk about it. You might  
10 be sequestered after the jury has heard the final arguments  
11 from the lawyers and goes back and starts to deliberate.  
12 Once that door closes and once you have the law in your hand  
13 and the jury is working on the decision, at that point the  
14 jury will not be allowed to separate, which means you would  
15 be put in a hotel, if the jury spends all day long and is  
16 unable to make a decision. You will, obviously, have  
17 several days advance notice that the Sheriff will probably  
18 tell you to bring an extra change of clothes with you today.

19 But it's just one of those things. I  
20 don't have a crystal ball, and sometimes it takes, you know,  
21 a short period of time and sometimes, you know, in  
22 California, a jury deliberated four months. So -- but  
23 that's California. So I just give people up front, I don't  
24 anticipate you being sequestered. I just don't anticipate  
25 it. You might be. But it would only be at the last part of

1 the trial.

2 Now, contact with the Court personnel.

3 If you see myself, the Court Reporter, the attorneys in this  
4 back hallway where you are going to go in a few minutes, I'm  
5 going to be rude to you. I'm not going to say as much as  
6 hello, because there's no way that I'm going to let anyone  
7 have any opportunity to say that there was contact, because  
8 it just -- I'm not going to go there.

9 It's the appearance of impropriety. If  
10 someone were to see that, they don't know if you're asking  
11 what time it is or what's for lunch, something completely  
12 benign. But the problem is an outside observer might not  
13 know what it was, because they didn't hear it. So the best  
14 way to do that, like I tell you with your coworkers and  
15 family members, or whatever, just don't talk to them.

16 Who can you talk to? The Sheriff over  
17 here. That's her job. She's the one who's in charge of the  
18 jury. And she'll be able to answer some of your questions  
19 and some of them she can't. And if she can't answer, she'll  
20 say, the Judge said I can't talk about it. But I'm trying  
21 to say, it's just the appearance of impropriety we avoid at  
22 all costs. After the trial is over, you can talk to anybody  
23 you want to talk to, as long as you want to.

24 So that's -- those, again, those are the  
25 rules. If you will give me a few minutes when my printer

1 has decided to talk to the computer this morning, I will  
2 print those two documents for you. If you would like to go  
3 with the Sheriff, she has some more information to go over  
4 with you.

5 PROSPECTIVE JUROR: Okay.

6 THE COURT: Thank you very much, sir.

7 [Prospective juror out]

8 THE COURT: John Henderson.

9 [Prospective juror in]

10 THE COURT: Good morning, sir. We have  
11 John Robert Henderson; is that correct?

12 PROSPECTIVE JUROR: Yes, sir.

13 THE COURT: It's juror No. 5215. Welcome  
14 to the 283rd.

15 PROSPECTIVE JUROR: Thank you.

16 THE COURT: Sorry for the delay in  
17 getting you in. We never know exactly how long we're going  
18 to speak with someone. Obviously, you've had time to review  
19 the guide I provided for you, hopefully more than once. And  
20 I gave you a copy of your questionnaire that you filled out  
21 for us in May.

22 PROSPECTIVE JUROR: Okay.

23 THE COURT: And I hope that you began to  
24 think about some of the issues that we're going to discuss  
25 today. And the objective here is for you to have a working

1 knowledge of the law. That's what this whole interview  
2 process is going to be about. The attorneys are going to  
3 give you examples, explain the law to you.

4 And at the end of the process, I have two  
5 questions I must ask. Number one is do you, in fact,  
6 understand the law? And number two, can you follow the law?  
7 That's the big picture I have to have. The only question I  
8 have for you at this time, sir, is will you be able to serve  
9 this Court for a period of two weeks beginning on November  
10 10th?

11 PROSPECTIVE JUROR: Yes.

12 THE COURT: Thank you, sir. You may  
13 inquire, Mr. Wirsky.

14 MR. WIRSKYE: May it please the Court?

15 JOHN HENDERSON,  
16 having been duly sworn, was examined and testified as  
17 follows:

18 DIRECT EXAMINATION

19 BY MR. WIRSKYE:

20 Q. Mr. Henderson, how are you this morning?

21 A. Good. How are you doing?

22 Q. Good. Thanks for coming down. Sounds like  
23 letters got crossed or something and you just got your phone  
24 call?

25 A. Yeah. I should listen to my wife more often.

1 Q. I think I'm in that boat as well. But thanks  
2 for coming down on short notice. My name is Bill Wirskye.  
3 I'll be the Assistant DA that will be visiting with you for  
4 the next few minutes.

5 What I'd like to do is follow up on some  
6 of that information that you were kind enough to give us in  
7 our extensive questionnaire, talk to you a little bit about  
8 your thoughts and feelings about the death penalty, and  
9 then, finally, talk to you about some of the laws and some  
10 of the rules that apply in a case such as this, a death  
11 penalty case. Any questions before we get started about  
12 what's going on or why you are here, or --

13 A. No, sir.

14 Q. I know it was kind of sudden to get that phone  
15 call this morning, but it looks like you are the general  
16 manager for Anderson Creative Expressions; is that right?

17 A. Yes, sir.

18 Q. What type of business is that?

19 A. It's a furniture business.

20 Q. Okay. What do you kind of do on a day-in,  
21 day-out basis?

22 A. Monitor goings on in the warehouse,  
23 deliveries, ordering of furniture, people's schedules, time,  
24 things of that nature.

25 Q. Okay. Before that, you -- I think you put



1 down you were a carpenter, self-employed; is that right?

2 A. Uh-huh.

3 Q. Okay. How long did you do that?

4 A. Um, about five or seven years, just off and  
5 on.

6 Q. Okay. So with enough notice you think you  
7 could schedule two weeks for us in November, if you had to?

8 A. Sure.

9 Q. Okay. You are originally from south Texas; is  
10 that right?

11 A. Born, yes.

12 Q. Okay. And your dad was with the INS; is that  
13 right?

14 A. Yes.

15 Q. What did he do with INS?

16 A. He started as a border patrol officer and  
17 worked his way up in INS, and he's retired.

18 Q. Okay. And, let's see, how long have you been  
19 in Dallas?

20 A. I moved into Dallas about four years ago.

21 Q. Okay. What do you think of Dallas so far?

22 A. I like it.

23 Q. Okay. Um, let's see. You told us, I guess,  
24 generally, or I think you said in certain cases, you are in  
25 favor of the death penalty; is that right?

1 A. Depends on the case.

2 Q. Sure. Why do you think we should have a death  
3 penalty or why do you think it should be an option in some  
4 cases? You know, what purpose do you think it serves  
5 society?

6 A. Sometimes it just fits the crime. I mean, it  
7 just depends on the case to me. Some of those cases just --  
8 it just seems like it's the right thing to do. Why, you  
9 know, let somebody sit in jail? It's almost just an equal  
10 amount of punishment, I believe, as to be sitting in jail  
11 than it is to be put to death. Sometimes it's a lighter  
12 sentence in my opinion.

13 Q. When you think of one of those types of cases  
14 where the death penalty is appropriate, what type of case  
15 are you thinking of or what facts or scenario do you  
16 envision?

17 A. Um, children, crimes of children, of course,  
18 murder, you know, just sometimes it just depends on the  
19 case, a murder case where it's unintentional, you know. A  
20 drunk driver hits somebody. It's, of course -- it's, you  
21 know, murder, but it just -- it just depends on the case.

22 Q. Okay. Would you limit the death penalty to  
23 only those cases where a life is taken?

24 A. Yes, I would say that.

25 Q. Okay. Just to let you know, in Texas we

1 reserve the option of the death penalty just for murder  
2 cases. And then only a certain type of murder or a certain  
3 subset of murder cases, are the only ones that are eligible  
4 for the death penalty.

5 If you kill a certain person, like a  
6 police officer, a fireman, or prison guard on duty, child  
7 under six, a young child, if you commit an intentional  
8 murder during the course of a robbery, a burglary, rape,  
9 that type of thing, or mass murder, serial murder, murder  
10 for hire, you hire someone to kill your spouse or your  
11 business partner, those are the only types of murders that  
12 we reserve the option of capital punishment for. Is that  
13 pretty much, that list, in accord with your views of the  
14 type cases?

15 A. Yes.

16 Q. Okay. Let me ask you another situation we  
17 always talk to people about, and it comes up frequently, is  
18 what we call in Texas the law of parties. I think you  
19 probably -- it's most commonly known to most people as  
20 accomplices, the law of accomplices. Oftentimes crimes can  
21 be committed, you know, by more than just one person. A  
22 group or gang of individuals can commit a crime.

23 When you are talking about a capital  
24 murder type scenario, it may be a situation where only one  
25 of those people who was actively involved in a capital

1 murder actually pulled the trigger. For lack of a better  
2 word, we can call him the triggerman. There may be other  
3 people who are actively involved in the crime, but didn't  
4 actually cause the death of the victim, accomplices,  
5 nontriggermen accomplices.

6 Some people who are in favor of the death  
7 penalty would reserve the death penalty just for those  
8 people that actually pulled the trigger. And if it were up  
9 to them, they'd take the death penalty off the table for the  
10 accomplice. I mean, they may want to lock them up for life  
11 and make sure they never get out, but they just don't feel  
12 for whatever reason that the death penalty is particularly  
13 justified for the nontriggerman accomplice.

14 And other people feel differently, you  
15 know, just depending on the facts and circumstances of the  
16 case. Where do you kind of come down on that issue with  
17 respect to the accomplices?

18 A. You, basically, answered it for me, just  
19 depending on the facts and circumstances of the case, what  
20 role they played in the murder. And I don't know the facts  
21 or circumstances of the case, so.

22 Q. Okay. So you wouldn't just automatically take  
23 the death penalty off the table for those nontriggerman  
24 accomplices?

25 A. Not automatically.

1 Q. Okay. And I think the law is pretty much in  
2 accord with where you are. Let me give you a hypothetical  
3 or an example --

4 A. Okay.

5 Q. -- to kind of illustrate the law. Let's say a  
6 buddy of mine decide that we're, you know, we get together  
7 and agree we're going to rob a bank. The plan is for my  
8 buddy to take the pistol in, a loaded gun. He's going to  
9 hold up all the tellers. I'm going to go in unarmed. I  
10 have a bag with me. And while he's holding up the tellers,  
11 I'm going to clean out all the cash drawers. That's the  
12 plan we come up with to rob the bank.

13 Let's say that at some point during that  
14 bank robbery, for whatever reason, maybe one of the tellers  
15 looks at him funny or, you know, I see one of them going for  
16 a silent alarm to call the police and I tell him that, for  
17 whatever reason he shoots and kills one of the tellers.  
18 Okay? And we make our getaway.

19 He's, obviously, committed capital  
20 murder, an intentional murder in the course of a robbery.  
21 He could be convicted of that and ultimately face the death  
22 penalty, depending on what the jury thinks. The law also  
23 allows, depending on the facts and circumstances, me, the  
24 nontriggerman accomplice in that case, to face the death  
25 penalty. What do you think about that type of scenario?

1           A.       And they could prove that that was the case, I  
2 would have to say that I don't think that he should be tried  
3 for the death penalty.

4           Q.       Okay. In my example, me?

5           A.       In your example, yes, if that was proven.

6           Q.       Okay. How come?

7           A.       Just because it's not premeditated. I mean,  
8 he didn't -- if the other man -- I can see the case where,  
9 yeah, I would agree with trying him for the death penalty.  
10 But the man without the gun and without the intent --

11          Q.       Okay. I think you focus on what a lot of  
12 jurors do. Intent is very important for you?

13          A.       Uh-huh.

14          Q.       And, in my example, I had no intent that  
15 anyone die. Basically, what the law is in Texas, using that  
16 example as an illustration, there are two ways for an  
17 accomplice to be found guilty of capital murder, the guy in  
18 my shoes.

19                   One of them would be if I aided,  
20 directed, or encouraged him to commit capital murder. You  
21 know, maybe I turned to him and said, he's going for an  
22 alarm, shoot and kill him. Obviously, at that point I'd be  
23 just as guilty. I had the intent, which sounds like is  
24 important to you.

25          A.       Uh-huh.

1 Q. I could be found guilty of capital murder and  
2 ultimately face the death penalty. The second way, and a  
3 lot of people have some concerns or hesitations about this  
4 aspect of the law, is under the law of conspiracy.  
5 Basically, if two people have conspired to commit bank  
6 robbery, like we did, a murder happens during that bank  
7 robbery, and if the jury feels that I should have  
8 anticipated that murder could happen, the accomplice should  
9 have anticipated a life could be taken, even though I had no  
10 intent, I could still be found guilty of capital murder and  
11 face the death penalty.

12 And there are a lot of people who feel  
13 very strongly that that just shouldn't be the case, because  
14 the person in my shoes in that second scenario had no  
15 intent. And I guess if it were up to them, they would only  
16 reserve the death penalty for an accomplice that had intent.  
17 Is that clear to you?

18 A. Yeah. Yes, it's clear to me.

19 Q. Okay. It sounds like that's kind of where you  
20 are; is that right?

21 A. Yes.

22 Q. And unless an accomplice had that intent, you  
23 would just take the death penalty off the table; is that  
24 right?

25 A. Well, if you could prove, I mean, he knew what

1 he was getting into. It's not like he just jumped into the  
2 crime not knowing that, you know, the personality of the  
3 person he's robbing a bank with. I mean, it just all  
4 depends on the case. I mean, it's -- if he knew, if you  
5 could prove that he thought his buddy was never going to  
6 pull the trigger, you know, that could be a different case  
7 than if he knew this guy's past and his, you know.

8 Q. Okay. So even if the person didn't have any  
9 intent, if he knew, I guess, who his partner was or knew his  
10 partner was very violent?

11 A. Uh-huh.

12 Q. Then maybe you could see the death penalty for  
13 that accomplice?

14 A. Yes, I could see that.

15 Q. Okay. Fair enough. Let me talk to you a  
16 little bit about the pretrial publicity in this case. You,  
17 like almost everyone we've talked to, indicated they had  
18 heard, I think, or read maybe some of the facts of this case  
19 or what the media has reported.

20 And we know it affects different people  
21 differently. It's not like the usual criminal case where  
22 you come down for jury duty and you have no idea what case  
23 it is. But what do you remember hearing about this case?

24 A. Um, if I'm correct, they escaped from prison.  
25 That's what I heard, they escaped from prison, and they



1 robbed a sporting goods store or something, Oshman's? And  
2 allegedly escaped again. They got away with that, and  
3 killed a police officer or -- I can't remember all the --  
4 it's been so long. And then they got caught in Colorado or  
5 something. It's real vague.

6 Q. Did you follow any of the court proceedings in  
7 these cases?

8 A. No.

9 Q. Okay.

10 A. I hardly watch the news.

11 Q. Okay. Knowing what you know about the case,  
12 how do you think it might affect you, if you were picked to  
13 be a juror on this case? Because we know it affects  
14 different people differently, because you don't really bring  
15 up a clean slate, you know, to the trial, but how do you  
16 think it would affect you?

17 A. Knowing what I know, how would it affect me?

18 Q. Uh-huh.

19 A. I mean, you have to find some truth in it, you  
20 know. But like I said, you just don't know until you hear  
21 all the details of the case.

22 Q. Okay.

23 A. I just don't know that much about it.

24 Q. Do you think if you were selected to be a  
25 juror on this case, that you could base your verdict just on

1 the facts and the evidence that you hear in the courtroom,  
2 and not be influenced by what you may have heard during the  
3 pretrial publicity?

4 A. Yes.

5 Q. Okay. Fair enough. Just a second,  
6 Mr. Henderson.

7 MS. BUSBEE: Your Honor, I believe the  
8 parties have reached an agreement on this juror.

9 THE COURT: Mr. Henderson, the parties  
10 have agreed to excuse you from jury service in this case.

11 PROSPECTIVE JUROR: Thank you.

12 THE COURT: Appreciate you coming down,  
13 and you are free to go.

14 [Prospective juror out]

15 (Recess)

16 THE COURT: Kathy Fitzgerald.

17 [Prospective juror in]

18 THE COURT: Good afternoon.

19 PROSPECTIVE JUROR: Hi.

20 THE COURT: How are you?

21 PROSPECTIVE JUROR: Great. Thanks.

22 THE COURT: Welcome to the 283rd. Have  
23 you had an opportunity to -- I see you brought your book. I  
24 hope you didn't have too much time to read that.

25 PROSPECTIVE JUROR: I didn't.

1 THE COURT: I hope you read the guide I  
2 provided for you.

3 PROSPECTIVE JUROR: I did.

4 THE COURT: And the copy of the  
5 questionnaire that you filled out for us back in May. The  
6 idea is there to have you begin to think about the law and  
7 the issues that are before us in this case. This is an  
8 opportunity for you to visit with the attorneys and gain a  
9 working knowledge of the law and how it relates. Please ask  
10 questions. This is the opportunity for you to understand.

11 It's a lot of law to give someone. There  
12 are no wrong answers. I know people come in and they're  
13 kind of nervous, like you. You've never been through this  
14 before. We understand that. There will be two questions I  
15 need to answer at the end of the process. The first one  
16 being, do you, in fact, understand the law? Number two, can  
17 you follow the law? That's the big picture I have.

18 The only question that I have for you now  
19 is will you be able to serve this Court for a period of two  
20 weeks beginning on November 10th?

21 PROSPECTIVE JUROR: Yes.

22 THE COURT: Thank you so much. Please  
23 turn your attention to Mr. Shook. You may inquire.

24 MR. SHOOK: May it please the Court?

25 KATHY FITZGERALD,

1 having been duly sworn, was examined and testified as  
2 follows:

3 DIRECT EXAMINATION

4 BY MR. SHOOK:

5 Q. Ms. Fitzgerald, my name is Toby Shook. I'll  
6 be asking you questions on behalf of the State. And, as the  
7 Judge said, there aren't any right or wrong answers. We're  
8 just looking for your honest opinions. Because it is a  
9 death penalty case, we have this procedure where we talk to  
10 every juror one on one. We're not putting you on trial,  
11 though it seems that way since you are on the witness stand.  
12 But we found it's a good way to get information. And if you  
13 have any questions at any time, feel free to ask. Okay?

14 A. Yes.

15 Q. I'll cover a couple of things in your  
16 questionnaire and then we'll talk about capital murder and  
17 some of the laws and rules that apply and get your opinions  
18 on those. I see from your questionnaire that you were born  
19 and raised in Dallas?

20 A. Yes.

21 Q. What part of Dallas were you raised in?

22 A. Oak Cliff.

23 Q. Okay. What high school did you go to?

24 A. Kimball and then left Kimball and went to  
25 Plano the middle of my sophomore year.

1 Q. Okay. I went to Woodrow. It's rare and it  
2 seems it gets rarer all the time to find someone who  
3 actually grew up in Dallas that lives in Dallas now, but --  
4 you work at Akin Gump and I know they don't really do  
5 criminal law at all.

6 A. No.

7 Q. The last I checked, they didn't.

8 A. Right.

9 Q. What area of law do you work in with the  
10 lawyers over there?

11 A. I'm currently doing corporate.

12 Q. Okay. None of the lawyers you work with, do  
13 they ever handle criminal law or involved in it in any way?

14 A. No.

15 Q. Okay. Have you ever been down or sat on a  
16 jury at all?

17 A. Not actually on a jury, no.

18 Q. Just a panel?

19 A. No, I come to jury duty every six months.

20 Q. Oh, you are one of those that get called all  
21 the time?

22 A. I'm one of the lucky ones, uh-huh.

23 Q. Okay. But you haven't made it on a jury yet?

24 A. Right.

25 Q. Okay. We had one section of the questionnaire

1 that asks if you have heard about this case and we had a  
2 brief paragraph about it. Do you recall the case at all?

3 A. I'm totally clueless.

4 Q. Okay.

5 A. I don't watch television, don't read the  
6 newspapers.

7 Q. All right. Well, let me talk to you kind of  
8 in general, then, about capital murder. On the  
9 questionnaire you said that you are in favor of the death  
10 penalty as a law. And I would like you to just kind of  
11 expand on that and maybe tell us why you think we should  
12 have the death penalty or the purpose you think it serves  
13 society.

14 A. Um, I feel if people do things bad enough or  
15 even medium bad, repeatedly, they deserve to die for that.

16 Q. Okay. When you think of crimes that might be  
17 appropriate or at least in consideration for the death  
18 penalty, what types of crimes come to mind?

19 A. Um, brutal murders, brutal, any type of brutal  
20 thing that would hurt a person even permanently.

21 Q. Okay. So in your own personal opinion it  
22 wouldn't necessarily have to have a life taken. It could be  
23 someone that's brutally injured?

24 A. Correct.

25 Q. Something like that?

1 A. Correct.

2 Q. Okay. Have you always felt this way about the  
3 death penalty since you were an adult?

4 A. Uh-huh.

5 Q. Where do you think you formed your opinions?  
6 Just the way you were raised, do you think?

7 A. Um.

8 Q. Things you saw as you grew up?

9 A. I don't think that would be it.

10 Q. Okay.

11 A. I don't know if my parents believe in the  
12 death penalty or not. It's just --

13 Q. Something you --

14 A. Something I formed, I guess, over time.

15 Q. Matured into over the years?

16 A. Maybe.

17 Q. Never been against the death penalty?

18 A. Never.

19 Q. Okay. Have you followed any death penalty  
20 cases at all in Texas?

21 A. Never.

22 Q. All right. Just kind of -- you just kind of  
23 base it on what is a just punishment?

24 A. What I feel is fair.

25 Q. Fair for whatever the particular facts?

1 A. Right.

2 Q. Okay. Well, in Texas I know you kind of  
3 looked at that packet probably?

4 A. Uh-huh.

5 Q. As the law is today, the death penalty is just  
6 reserved for murder cases and then only certain types. When  
7 we talk about murder, we're not talking about self-defense  
8 or an accident. We're talking about an intentional killing.  
9 But a lot of murder cases, intentional murders, don't fall  
10 under the death penalty statute. A person could get a life  
11 sentence, but couldn't get the death penalty.

12 You have to have some other aggravating  
13 fact, such as a murder that occurs during a felony, like if  
14 I went in, in a robbery, robbed a 7-Eleven and murdered the  
15 clerk. That could be a death penalty case. Murder in a  
16 burglary, if I broke into someone's home and killed someone  
17 in the house, or during a rape, during a kidnapping, during  
18 an arson.

19 Also, murder of specific victims like a  
20 police officer on duty, fireman on duty, or prison guard on  
21 duty, as well as a child under the age of six. I don't know  
22 why they chose that age, but they had to choose an age. But  
23 that's where they are right now. Murder of more than one  
24 victim, serial killer situation, or a spree killer, and then  
25 murder for hire, someone does it for profit, that sort of



1 thing. But those are most of the examples or the areas that  
2 are eligible for the death penalty.

3 As far as that list goes, from your own  
4 personal point of view, do you agree with those types of  
5 cases, at least for consideration?

6 A. I do.

7 Q. None of them you would take off from your own  
8 point of view?

9 A. No.

10 Q. Okay. Now, another area of the law has to do  
11 with what we call the law of parties. I think it's more  
12 commonly known as accomplices. Sometimes we have more than  
13 one person commit a crime. The law says that if they are  
14 involved, participate in the crime, then they can be held  
15 accountable, even if some individuals have a greater role.

16 The same is true in a capital murder  
17 situation. You may have more than one person that commits a  
18 capital murder. You may have, in fact, only one person that  
19 is responsible for the murder, the triggerman, which he may  
20 have accomplices.

21 But an example I give is, let's say,  
22 Mr. Wirsky and I and a third person we get, all agree to go  
23 commit a bank robbery. And our plan is for our friend to  
24 drive us there because he has a fast car. He's going to  
25 wait outside, keep the car running, and warn us if anyone is

1 coming, and drive away quickly. We go in, I've got a gun.  
2 I point it, threaten everyone with it, get everyone's hands  
3 in the air. And after I have subdued them, Mr. Wirskye goes  
4 in and he's got a bag and he starts loading up all the cash  
5 out of the drawers.

6                   During the course of that robbery I  
7 intentionally murder someone. Maybe I don't like the way  
8 the teller is looking at me or he warns me one is going for  
9 an alarm, but I shoot them. We jump in the getaway car, he  
10 speeds off, and we're caught, say, a few blocks away.

11                   Obviously, I can be prosecuted for the  
12 death penalty. I think when most people think of a death  
13 penalty case they come up with examples of the actual  
14 triggerman. That is natural. The law says that Mr. Wirskye  
15 and the getaway driver could also be prosecuted. And if the  
16 facts are they are actively involved in the crime, they  
17 could be found guilty and could ultimately even receive the  
18 death penalty.

19                   People feel differently as far as  
20 accomplices go, the nontriggerman. Some people are  
21 philosophically for the death penalty, but they feel it's  
22 only right, if you use it for the triggerman, the person  
23 that actually causes the death. If it were up to them, they  
24 may reserve a long term of years for the accomplice. But  
25 they don't feel the death penalty is appropriate for an

1 accomplice situation.

2 Other jurors feel that accomplices, if  
3 they are involved, should be held accountable, can be found  
4 guilty, and ultimately could receive the death penalty  
5 because of their involvement. But people feel differently  
6 one way or the other. We just like to get everyone's gut  
7 reaction on that, the prosecution in the death penalty case  
8 of an accomplice. How do you feel about that area of the  
9 law?

10 A. I think they are just as responsible.

11 Q. Okay. If you are actively participating, then  
12 you feel it's fair to be prosecuted and ultimately receive  
13 the death penalty?

14 A. Sure.

15 Q. What factors do you think are important in  
16 those situations?

17 A. As far as?

18 Q. As the accomplice and being appropriate for  
19 the death penalty and that sort of thing.

20 A. Well, if they are there, they know that they  
21 are taking part in a crime to some degree and whether the  
22 gun going off is an accident, on purpose, whatever, they are  
23 just as responsible, or they shouldn't have been there.

24 Q. Okay. So if they knowingly know what is going  
25 on and are participating in it, then you feel it's fair?

1           A.       Yes.

2           Q.       Okay. That's where the law lies. If you are  
3 present and don't know what's going on, they call it mere  
4 presence alone, doesn't make you an accomplice. If we had  
5 duped, let's say, the getaway driver and he didn't know what  
6 we were doing when we said we were going to go cash a check,  
7 wait outside. Then, obviously, he wouldn't be an accomplice  
8 to our crime under the law, because if that were the real  
9 facts, he didn't know why we went in there.

10          A.       Right.

11          Q.       Now, if it was a situation where he did, was  
12 in on the plan, then he can be held responsible. But that's  
13 the difference, is that active participation, knowing what  
14 is going on. In fact, there's two theories of law. One is  
15 if you are actively involved, knowingly, directing,  
16 encouraging in any way, but you are not the actual  
17 triggerman, you can be found guilty.

18                   Or the other theory of law is, we call it  
19 conspiracy. If two or more people conspire to commit one  
20 felony, in this case three of us conspire or agree to commit  
21 the robbery, and one of us commits another one, murder, to  
22 further it, then everyone can be held responsible, found  
23 guilty, if the jury believes from the facts that they should  
24 have anticipated that could occur.

25                   I think that goes along with what you

1 said. They knew the risks, someone is going in there with a  
2 gun, that sort of thing. And they could be found guilty  
3 that way, even if they don't have the direct intent for a  
4 death to occur. To get to the death penalty, you know, the  
5 first part is we have to prove that they should have  
6 anticipated and then in the punishment phase we have to  
7 prove that they did anticipate. And, again, it's all the  
8 surrounding facts, that sort of thing.

9 I take it from your answers you are on  
10 board with that as far as that could be appropriate, just  
11 depending on the individual facts of each case?

12 A. Yes.

13 Q. Okay. Now in Texas, a trial is divided into  
14 two parts. There's the guilt/innocence stage and then  
15 there's the punishment phase. If we don't meet our burden  
16 of proof, then it's a not guilty finding and everyone goes  
17 home. If we do, the trial is not over. You then go to the  
18 punishment phase and you can hear additional evidence. At  
19 the close of that is when we get these Special Issues and  
20 I'll go over those more in a moment.

21 But, basically, what the State has to  
22 prove is the defendant would be a continuing danger to  
23 society, that they either caused the death or anticipated  
24 that a death would occur, and there's not sufficient  
25 mitigating evidence to warrant a life sentence. But if

1 those questions are answered yes, yes, and no, the Judge has  
2 no discretion. He would sentence the defendant to death.  
3 If they are answered any other way, it's going to be a life  
4 sentence.

5 But those are the only two possible  
6 outcomes, all determined by how the jury answers those  
7 questions. Now, are you familiar with the method of  
8 execution in Texas?

9 A. Lethal injection.

10 Q. That's right.

11 A. Uh-huh.

12 Q. Growing up here in Texas, you probably know  
13 that executions are actually carried out. Texas, in fact,  
14 leads the nation in executions. Some states have it on the  
15 books and they don't prosecute it, or if they do, they  
16 rarely carry it out. But that's not the situation in Texas.  
17 The procedures are the same in each case and they would be  
18 the same in this case.

19 If the defendant were found guilty and  
20 those questions were answered in that way, he would be  
21 sentenced to death. He'd be placed on death row and at some  
22 point in time would be executed by lethal injection, which  
23 it's like clockwork now, the way they do it.

24 The date of execution he's given a last  
25 meal, time with family, friends, a minister. But at 6:00

1 p.m. the executions take place in Huntsville. There's  
2 witnesses there from both sides, the victim's side as well  
3 as the defendant's. He's placed on a gurney which, I don't  
4 know, you may have seen photos, they show them on the news.  
5 But it's just a regular gurney, secured there, needles  
6 placed in his arm. He's able to give a last statement. But  
7 after that, they simply signal the executioner who injects  
8 lethal chemicals which stop the heart, stop the lungs, he  
9 elapses into a coma.

10 Quite frankly, that's our goal in this  
11 case. We feel we have the type and quality of evidence to  
12 convince a jury of the defendant's guilt and that those  
13 questions will be answered in a way which would result in  
14 his execution. The defense takes the opposite view, which  
15 is why we're going through this process.

16 You've told us philosophically you do  
17 believe in the death penalty. You do believe in its  
18 prosecution and application under the appropriate facts.  
19 Looking in your heart of hearts, do you feel you're the type  
20 of person who, if you were placed on this type of jury, you  
21 could make these decisions, if it were proven to you, and  
22 actually take pen in hand and answer those questions,  
23 knowing that if you do it a certain way, the defendant would  
24 be executed?

25 A. Definitely.

1 Q. Okay. Why do you feel that you are that type  
2 of person?

3 A. Um, I feel very strongly, first of all, I  
4 don't feel like the people who do crimes like that get hard  
5 enough punishments in a lot of cases.

6 Q. Okay.

7 A. And if they deserve it, they deserve it.

8 Q. Okay. Fair enough. Now, the area of law that  
9 you checked off is that you felt it was appropriate in some  
10 murder cases. The way the scheme is, just because you are  
11 found guilty in a capital murder, doesn't mean the death  
12 penalty. Some situations you are going to get a life  
13 sentence and some a death sentence. It all depends on how  
14 those questions are answered.

15 Do you feel that's a fair way to go  
16 through the process, that the death sentence or a life  
17 sentence could occur once you are found guilty?

18 A. Sure.

19 Q. Okay. Again, it's just going to depend on the  
20 facts of each case.

21 A. Exactly.

22 Q. If you would take a moment to read question  
23 No. 1 and I'll go over these Special Issues with you.

24 A. (Prospective juror complies.) Okay.

25 Q. That's the future dangerousness question. It



1 asks you to make a prediction. Do you feel you could make  
2 that prediction about how someone will behave, if you are  
3 given enough information?

4 A. Yes.

5 Q. What types of information would you want to  
6 know before you answer that question?

7 A. Well, I guess, not knowing any more about the  
8 case than a police officer was unfortunately killed, and I  
9 guess I would have to know more about what's happened to  
10 lead to this point.

11 Q. Okay. All right. And we can't give you any  
12 facts, obviously, from the case.

13 A. Right.

14 Q. We're just kind of speaking in hypotheticals.

15 A. Right.

16 Q. But, obviously, you would get the facts of the  
17 case. You would have found him guilty. But then you'd get  
18 to review those facts again from the angle of that question  
19 and if there's any background evidence on the person. If  
20 they've been in trouble before, if they've ever been  
21 convicted of crimes, that information is available.

22 You can even hear from the witnesses.  
23 You can hear good things about their background and bad  
24 things, kind of "This Is Your Life". You get to hear their  
25 whole story. And all that goes into that question, also.

1 So you will have the facts of the offense, as well as the  
2 background information on the individual to make that  
3 decision..

4 Do you feel that all would be helpful and  
5 give you sufficient facts to render a decision one way or  
6 the other?

7 A. Um, yes.

8 Q. Okay. Now this question starts out with a no  
9 answer under the law and the State must prove to you beyond  
10 a reasonable doubt it should be answered yes. We do that by  
11 putting on additional evidence and, again, you go back and  
12 review the guilt/innocence evidence, the person's role in  
13 the crime, and then determine if we've proven it beyond a  
14 reasonable doubt that he is dangerous.

15 What the law requires a juror to do is  
16 wait for all the evidence to come in, then deliberate and  
17 make their decision from the issue of that question.  
18 There's no automatic answers, in other words. If there was  
19 an automatic yes if you found the defendant guilty, there  
20 wouldn't be any need for a question or deliberation. And  
21 that just takes some mental discipline.

22 We do have some jurors who say, I know  
23 what the law is, but if I found him guilty, in my mind he's  
24 dangerous, and that's always going to be a yes, no matter  
25 what the facts. The law contemplates that there might be

1 facts which prove him to be dangerous and there may not.

2 It's just going to depend on each case.

3 And as a juror you have to be able to  
4 tell the Judge, just because I found him guilty, doesn't  
5 mean it's a yes. I'm going to have to wait and see what the  
6 facts are and then make that decision. Do you feel you  
7 could do that?

8 A. Yes.

9 Q. And could you require the State to prove to  
10 you beyond a reasonable doubt that it should be a yes  
11 answer?

12 A. Yes.

13 Q. And if we fail in our burden of proof, you  
14 could leave it as a no?

15 A. Yes.

16 Q. Okay. Now, the second question has to do with  
17 that accomplice situation we talked about. The first part  
18 of the question asked whether the defendant actually caused  
19 the death. If you think he's the triggerman, then that part  
20 of the question is answered. But the second part asks if he  
21 didn't actually cause the death of the deceased, but  
22 intended to kill the deceased or another, or anticipated  
23 that a human life would be taken.

24 So if it's an accomplice we have to prove  
25 from the facts that either they had the intention to kill

1 the person or they did anticipate. Remember, I told you in  
2 the guilt/innocence we have to prove he should have  
3 anticipated. And here we have to go a step further and  
4 prove that he actually did anticipate. Do you see the  
5 difference there?

6 A. Uh-huh.

7 Q. It might be slight in your mind, but you have  
8 to be able to recognize that difference and give it that  
9 application. Now, it may be the same exact evidence. You  
10 just have to look at it from this angle here and then  
11 determine if the State has proven it to you beyond a  
12 reasonable doubt. And you can use the additional evidence,  
13 if you think it's relevant, regarding a person's background  
14 to help you answer that question, also.

15 But all that goes into Special Issue No.  
16 2. But it is answered separately. It starts out with a no  
17 answer and the State is required under law to prove it to  
18 you beyond a reasonable doubt that it should be answered  
19 yes. Do you feel you could do that?

20 A. Yes.

21 Q. And, again, if we fail to prove it to you,  
22 would you be able to leave it as a no answer?

23 A. Yes.

24 Q. Okay. The law, again, requires, they want  
25 jurors to wait and look at these issues separately and weigh

1     them separately.

2                     This last question is the mitigation  
3     question. Neither side has the burden of proof in this  
4     issue. It allows you to look at all the evidence and  
5     determine to be able to use mercy, if you want to. If you  
6     think it's the right thing to do that he get a life sentence  
7     rather than a death sentence, you could leave it that way.

8                     And what's mitigating is going to be up  
9     to you and the other jurors. We can't tell you what it will  
10    be. You just have to be able to tell the Court that you can  
11    keep your mind open to it, because it covers everything, you  
12    know.

13                    It asks, considering all the evidence,  
14    all the circumstances in the offense, the defendant's  
15    character and background, their personal moral culpability,  
16    is there sufficient mitigating evidence. It might be  
17    something in his background, the way he was raised, you  
18    know. It might be something about his mental capacity, he  
19    may be slower, could be something, who knows what.

20                    I heard one juror, they came up with the  
21    best description the way they described these issues is it's  
22    like a window closing. And if we prove Special Issue No. 1,  
23    the window closes a little more, Special Issue No. 2, a  
24    little more. And it was still open for Special Issue No. 3.  
25    He said it wasn't open much, but it was still open.

1 And that's going to vary on each juror.

2 But you have to be able to promise the Court that that  
3 window would be open or your mind would be open to it and if  
4 you see something sufficiently mitigating, you can answer it  
5 yes. If you don't, you can answer it no. Do you feel you  
6 can do that?

7 A. Yes.

8 Q. As you sit there today, can you think of  
9 anything that you would look at as potentially mitigating?

10 A. No.

11 Q. Okay. That's what most jurors tell us. It's  
12 kind of reassuring. We don't expect you to sit around  
13 thinking of these things. But can you assure the Court that  
14 your mind would be open to it?

15 A. Definitely.

16 Q. Okay. Again, you don't get to the question  
17 unless you have found him guilty, found he's a continuing  
18 danger, found that he intended a death to occur, but there  
19 still might be a situation that a life sentence should be  
20 imposed. And that's what the Courts have said is you have  
21 to keep your mind open to it, give it the proper weight, and  
22 then answer it yes or no, depending on the evidence.

23 Let me go over some rules and laws that  
24 apply to each case, each criminal case. You probably will  
25 be familiar with most of these. The presumption of

1 innocence. Every defendant charged, whether they've been  
2 arrested or even going through this jury selection process,  
3 is presumed to be innocent at the beginning of the trial.

4 And then the State must overcome that  
5 presumption by putting on the evidence and putting on the  
6 witnesses. But you have to start him with that presumption  
7 and require us to prove our case to you beyond a reasonable  
8 doubt. Do you feel you could follow that rule of law?

9 A. Yes.

10 Q. Give him that presumption and require us to  
11 prove our case?

12 A. Yes.

13 Q. Okay. The burden of proof is beyond a  
14 reasonable doubt and it never leaves this table. It never  
15 shifts to the defense. The defense, you might anticipate  
16 they are going to put on evidence, that sort of thing, but  
17 they don't have to. If you, when we rest our case and a  
18 reasonable doubt exists in your mind, you're obligated under  
19 law to find him not guilty. You can't require them to put  
20 on some evidence. Do you feel you can follow that rule of  
21 law?

22 A. Yes.

23 Q. That burden of proof goes to each and every  
24 element of the indictment. If we fail to prove on just one  
25 element, you are entitled under the law to find the

1 defendant not guilty. One of the elements would be the  
2 identity, obviously, of who committed this crime. If you  
3 had a reasonable doubt about that, you'd quickly find him  
4 not guilty.

5 But that burden of proof even goes to the  
6 county where this occurred. In fact, under the law it's  
7 just as important. If you had a reasonable doubt, maybe  
8 it's one of those cases that occurs near the county line and  
9 you think the case probably occurred in Tarrant County and  
10 you had a reasonable doubt about it, again, you would be  
11 obligated to find the defendant not guilty.

12 That would be a tremendous screw up on  
13 our part as far as our preparation and you could have us  
14 terminated, I'm sure. But you can't help us out as a juror.  
15 You have to judge a case like an umpire and call the balls  
16 and strikes as you see them.

17 Do you feel you could do that and require  
18 the State to prove to you their case on each and every  
19 element beyond a reasonable doubt?

20 A. Yes.

21 Q. The Fifth Amendment, if someone wants to  
22 testify, they can. No one can stop them. But if they  
23 choose not to, you can't hold that against them. There may  
24 be a lot of reasons why someone may not testify. They may  
25 be poorly educated or not perform well in front of people.



1 They might look guilty when they're not. They may just be  
2 following their lawyer's advice. They may be real guilty  
3 and it would hurt them.

4 The law takes care of that by simply  
5 explaining you can't hold that against them. You can only  
6 judge the case on the witnesses that you have heard. You  
7 can't speculate as to why someone may not testify. Can you  
8 follow that rule of law and just, if someone does not  
9 testify, not consider that in any way, just judge the case  
10 on the evidence that you have heard?

11 A. Yes.

12 Q. Okay. Sometimes parole laws come up in the  
13 news. The Judge would instruct you in a capital murder case  
14 that a person who has been convicted and serving a life  
15 sentence would have to serve forty calendar years before  
16 they became eligible for parole. And even then they may not  
17 be paroled.

18 But he would also instruct you that you  
19 can't consider the parole laws at any time in your  
20 deliberations. You just have to consider a life sentence, a  
21 life sentence. Do you feel you could do that?

22 A. Yes.

23 Q. Okay. Police officers often testify in  
24 criminal cases. Jurors respect the job they do. But you  
25 can't start them out ahead of other witnesses. You have to

1 wait and judge them. I mean, there are going to be good  
2 police officers and bad police officers, just like any other  
3 profession, and you'd have to wait and judge their  
4 credibility once they testify. Do you feel that you could  
5 do that?

6 A. Yes.

7 Q. Okay. Is there any questions over anything  
8 we've gone over so far?

9 A. No.

10 Q. I've covered a lot of stuff pretty quickly.  
11 But I think the principles are basic. As a juror in this  
12 type of case, you have to wait and let all the information  
13 in the guilt/innocence stage and then also the punishment  
14 stage and then decide if the State has proven these things  
15 to you.

16 Do you feel you could do that? You feel  
17 strongly about capital murder and punishment, but you, also,  
18 feel that if the State doesn't meet its burden of proof, you  
19 have no problem with a not guilty? You have no problem  
20 assessing someone a life sentence or a death sentence, just  
21 depending on what the facts are?

22 A. Right.

23 Q. Okay. Fair enough. I appreciate your  
24 patience.

25 MR. SHOOK: And that's all the questions

1 I'll have, Judge.

2 THE COURT: Ms. Busbee?

3 CROSS-EXAMINATION

4 BY MS. BUSBEE:

5 Q. Thank you, Ms. Fitzgerald, for coming down to  
6 talk to us today. I notice that you've written in your  
7 questionnaire about how you feel about serving as a juror  
8 that you would rather not. What were you thinking there?

9 A. Well, you know, when you get called for jury  
10 duty every six months, it is a whipping.

11 Q. It is. What does your employer say about  
12 that?

13 A. His last words as he was running out of the  
14 office to an 11:30 meeting this morning was, you better not  
15 get picked.

16 Q. I told you -- I told him he'd say that.

17 A. That's exactly what was said.

18 Q. Well, you know --

19 A. I said I can't believe that I even got this  
20 letter.

21 Q. Well, really, I mean, if this makes you feel  
22 any better, you should be flattered because only a small  
23 percentage of people do we deem to be reasonable enough to  
24 call down and talk to. I mean, we don't -- a lot of these  
25 we don't read because they've been culled out because their

1 numbers mean they wouldn't be qualified. They would always  
2 give the death penalty or they would never give the death  
3 penalty, so they kind of fall outside the range.

4 And then we have this whole stack of  
5 people that fall within the range and we'll go in there and  
6 we'll decide who we're going to talk to and we come out with  
7 one this big, because of things people put in their  
8 questionnaires. So, I guess, if that makes you feel any  
9 better, you are creme de la creme of the 5,000 people we  
10 brought down.

11 And, you know, and I hear from you, you  
12 are very prodeath penalty. Sometimes we get people here  
13 that are antideath penalty, you know, in leanings within  
14 those parameters. But they tell us, those are my personal  
15 feelings and nobody knows what this is, until they get down  
16 here.

17 But once they see this scheme, they say,  
18 well, I'm not writing the law and I'm not going to write the  
19 law. I can follow this law, despite the fact that I'm a  
20 very strong proponent of the death penalty or, you know, I  
21 have questions about the death penalty.

22 So that's the reason I'm asking you some  
23 questions is to, since you've been so frank about your  
24 support of the death penalty, are you all right with this  
25 scheme? Do you think that this is a fair scheme that you

1 could be comfortable with?

2 A. I can be comfortable with it because it's the  
3 way it is. In my opinion I'm fair and unfair. I think a  
4 lot of people who get off, it's unfair, you know, or get  
5 very light sentences for things that they do. I think  
6 that's unfair.

7 Q. Right.

8 A. But --

9 Q. So what should I be worried about, if you're  
10 on the jury? You work for lawyers. You can just tell me  
11 what it is that bothers you or you think might be, you know,  
12 less than ideal as a juror in this case.

13 A. Um, not knowing the case, it's hard to say.

14 Q. I don't want you to know the case. I want you  
15 to tell me why --

16 A. When it comes down to deliberations, I will be  
17 openminded, but I'll also give my opinion.

18 Q. Uh-huh.

19 A. And is my mind made up? There's no sense  
20 confusing me with the facts? No.

21 Q. Okay.

22 A. That's not how it is. But, um, I will state  
23 how I feel about things and I will listen to another  
24 person's perspective. Twelve people sitting there could  
25 hear things, the same thing, twelve different ways.

1 Q. They do.

2 A. Right.

3 Q. That's kind of why we kind of poke around in  
4 your psyche a little bit, just to see --

5 A. Right.

6 Q. Well, here's the situation. I don't want to  
7 go into the facts with you because that wouldn't be fair.  
8 But you do know that this is a case where a police officer  
9 was killed.

10 A. Uh-huh.

11 Q. And you brought that up. So under those  
12 circumstances, if you were on a jury and found someone  
13 guilty of the offense of capital murder as is charged in  
14 this case, do you think that you would be able to give a  
15 life sentence, if the facts fail to establish something for  
16 you as far as future dangerousness?

17 A. Definitely.

18 Q. Or whether or not that person intended that a  
19 human life would be taken?

20 A. Yes.

21 Q. You could say the State hasn't proven it to  
22 me, despite the fact that I'm furious that this officer  
23 died, which is human nature.

24 A. And I don't mean this disrespectful, I think a  
25 person, whether it's a police officer, a fireman, me, or

1 you, if they die, it's the same thing.

2 Q. Right.

3 A. I just do. A policeman knows what dangers  
4 he's going through. I know that I have to go deal with  
5 attorneys every day when I show up at the office. They know  
6 they have to go deal with criminals every day when they hit  
7 the street. I don't think it's any different.

8 Q. Okay. So -- right. Well, then, if you've  
9 convicted someone of just a generic capital murder, you  
10 would still be able to give a life sentence and make the  
11 State prove their case to you before you would give a death  
12 sentence?

13 A. Definitely.

14 Q. Okay. Because it's actually like three little  
15 trials; guilty, Special Issue No. 1, 2, and 3. Okay? And  
16 you've never been on a jury after all this time coming down  
17 here?

18 A. No. No.

19 Q. Oh, my goodness gracious. Maybe you should go  
20 downstairs and have a talk with them.

21 A. No, thank you.

22 Q. No, I'm talking about the jury services. It  
23 seems like your name is stuck in the computer.

24 A. I'll just quit driving and start riding the  
25 bus.

1 Q. Oh, that doesn't do any good.

2 A. Isn't it the driver's license number? For a  
3 long time I wouldn't register to vote.

4 Q. Voting, driver's license, utility bills. Now  
5 you could be getting popped, I think, maybe, dually, like on  
6 your driver's license and voter registration. But you'd  
7 have to give up having a name in order to not get called  
8 down here. But I realize it's not fair.

9 A. Right.

10 Q. Just one more thing. If you had found Special  
11 Issue No. 1 and 2 to be true beyond a reasonable doubt, that  
12 the person would be a future danger, the person intended or,  
13 excuse me, anticipated that a human life would be taken, are  
14 you the sort of person who, after having found those things,  
15 could still keep an open mind about giving a life sentence?

16 A. Sure.

17 Q. All right. I appreciate it.

18 MS. BUSBEE: Your Honor, that's all the  
19 questions I have of this witness.

20 THE COURT: Ms. Fitzgerald, if you would  
21 be so kind and wait for us outside in the hall, and we'll be  
22 back with you in a few minutes.

23 [Prospective juror out]

24 THE COURT: What says the State on juror  
25 No. 5326, Ms. Fitzgerald?



1 MR. SHOOK: We have no challenges for  
2 cause.

3 MS. BUSBEE: We have no challenges for  
4 cause.

5 THE COURT: Would you like to step into  
6 your office?

7 MS. BUSBEE: Yes, please.

8 (Recess)

9 THE COURT: What says the State?

10 MR. SHOOK: We accept the juror.

11 MS. BUSBEE: We will exercise our meager  
12 one preemptory challenge on Ms. Fitzgerald.

13 [Prospective juror in]

14 THE COURT: Ms. Fitzgerald, I have some  
15 bad news for you. We're not going to seat you on this jury.  
16 So your boss will be happy. I know you would like to have a  
17 normal forty-hour week, but we can't seat you on this jury.  
18 Please, please, don't leave here thinking, well, that's just  
19 one more shot at it that I didn't make the jury.

20 PROSPECTIVE JUROR: Oh, no, no, I don't  
21 feel that way.

22 THE COURT: As Ms. Busbee says, getting  
23 to this point and being considered is a compliment in and of  
24 itself. Both sides looked at your questionnaire and looking  
25 at it you are a very thoughtful and honest person and we

1 appreciate that so much.

2 As far as getting called every six  
3 months, I can tell you the computer is very exact. If your  
4 driver's license and your voter's registration certificate  
5 are not exactly the same, it doesn't see it as a duplicate  
6 and you get two summons. So you might want to check your  
7 ID, your voter's registration, against your driver's license  
8 and make sure they are exactly the same.

9 PROSPECTIVE JUROR: As far as address?

10 THE COURT: Full name and address because

11 --

12 PROSPECTIVE JUROR: Oh, it might not be.

13 THE COURT: Your computer goes in and if  
14 it catches a duplicate, it throws one of them out. So you  
15 can be in there twice as much as other people.

16 PROSPECTIVE JUROR: Right.

17 THE COURT: That might help you somewhat.

18 PROSPECTIVE JUROR: Thank you.

19 THE COURT: All right. Thank you so  
20 much. You are free to go.

21 PROSPECTIVE JUROR: Thank you.

22 [Prospective juror out]

23 THE COURT: Ready for Flores.

24 [Prospective juror in]

25 THE COURT: Good afternoon. Please have

1 a seat.

2 PROSPECTIVE JUROR: Good afternoon.

3 THE COURT: We've got Felix C. Flores,  
4 juror No. 5316. Welcome to the 283rd.

5 PROSPECTIVE JUROR: Thank you.

6 THE COURT: And have you had an  
7 opportunity to read the guide I provided for you?

8 PROSPECTIVE JUROR: Yes.

9 THE COURT: I also gave you a copy of  
10 your questionnaire for you to begin to think about some of  
11 the issues we're going to discuss. It's a lot of law to  
12 give someone. Please don't think you have to understand it  
13 all right now. This interview process was designed to help  
14 you have a working understanding of the law we're talking  
15 about and give you an opportunity to ask questions. We want  
16 you to ask questions because we want you to understand it.

17 PROSPECTIVE JUROR: Okay.

18 THE COURT: At the end of the process I  
19 have two questions I must ask. Number one is, do you, in  
20 fact, understand the law? Number two, can you follow the  
21 law? That's the big picture I have for you. The only  
22 question I have for you at this time, sir, is will you be  
23 able to serve this Court for a period of two weeks beginning  
24 on November 10th?

25 PROSPECTIVE JUROR: I've got some -- I'm

1 going to be heading out of town in November. I scheduled  
2 this -- I was supposed to be out of town during this month,  
3 but I cancelled it to be here. But I'm a pastor of a  
4 church, that's why. I have other churches to attend.

5 THE COURT: You have other churches? But  
6 that would just be on Sunday; is that correct?

7 PROSPECTIVE JUROR: But all these are  
8 other -- in Mexico, I have other outings I need to be out of  
9 town on November.

10 THE COURT: Okay. But you couldn't --  
11 you couldn't -- it would not -- you'd be able to certainly  
12 work on Sunday between the two weeks of trial, but you are  
13 telling me that you could not, or you would prefer not, to  
14 reschedule your time in November?

15 PROSPECTIVE JUROR: Well, my point is I  
16 rescheduled this month. I cancelled October to be in  
17 November, to be here today, because I have another jury duty  
18 on next Wednesday in Grand Prairie.

19 THE COURT: In Grand Prairie? If you are  
20 on this jury, I will take care of Grand Prairie for you.  
21 That wouldn't be a problem.

22 PROSPECTIVE JUROR: But if I can, yes,  
23 recancel, yes, reschedule.

24 THE COURT: I'm getting -- the parties  
25 have raised the flag.

1 MR. SHOOK: We will agree.

2 MS. BUSBEE: We will agree, Your Honor.

3 THE COURT: Mr. Flores, you see, I'm not  
4 going to let you out of jury service. But they have just  
5 agreed to allow you to take care of it, so now you do have  
6 to go to Grand Prairie next week. Okay?

7 PROSPECTIVE JUROR: Okay.

8 THE COURT: I appreciate the service you  
9 do for our community, and the parties have agreed to excuse  
10 you.

11 PROSPECTIVE JUROR: Okay.

12 THE COURT: Good luck to you. Thank you.

13 [Prospective juror out]

14 THE COURT: Mr. Patton.

15 [Prospective juror in]

16 THE COURT: Thank you. You may be  
17 seated. No. 5306, Sylvester Patton, III; is that correct?

18 PROSPECTIVE JUROR: Yes, sir.

19 THE COURT: Mr. Patton, have you had an  
20 opportunity to read the guide I prepared for you?

21 PROSPECTIVE JUROR: Yes, sir.

22 THE COURT: And also a copy of your  
23 questionnaire that you filled out for us back in May?

24 PROSPECTIVE JUROR: Yes.

25 THE COURT: That's a lot of law to give

1 someone when you first walk in the door. And that's for you  
2 to begin to think about some of the issues before the Court.  
3 This is an opportunity -- this interview is designed to  
4 allow you to ask questions with the objective of being able  
5 to reach a good working understanding of the law we're  
6 dealing with.

7 So, no wrong answers. We just want you  
8 to get up to speed and be able to understand it all.

9 PROSPECTIVE JUROR: Okay.

10 THE COURT: At the end of the process I  
11 have two questions I must ask. Number one is, in fact, do  
12 you understand the law? And number two, can you follow the  
13 law?

14 PROSPECTIVE JUROR: Yes and yes.

15 THE COURT: That's the question I'll ask  
16 you about an hour from now.

17 PROSPECTIVE JUROR: Okay.

18 THE COURT: At this point, the only  
19 question I have for you, sir, is will you be able to serve  
20 this Court for a period of two weeks beginning on November  
21 10th?

22 PROSPECTIVE JUROR: Yes.

23 THE COURT: Very well. With that I shall  
24 turn it over to Mr. Wirsky.

25 MR. WIRSKYE: May it please the Court?

1                    SYLVESTER PATTON, III,  
2       having been duly sworn, was examined and testified as  
3       follows:

4                    DIRECT EXAMINATION

5       BY MR. WIRSKYE:

6                    Q.       Mr. Patton, how are you this afternoon?

7                    A.       I'm doing good.

8                    Q.       Okay. My name is Bill Wirskye. I'll be the  
9       Assistant DA that will be talking with you for the next few  
10      minutes. I understand, I guess there was a miscommunication  
11      in getting you down here today, but we appreciate you coming  
12      down here as fast as you could.

13                                What I'd like to do is talk to you a  
14      little bit about some of the information in your  
15      questionnaire that you gave us, talk to you a little bit  
16      about your thoughts and feelings about the death penalty,  
17      since this is a case where the State is seeking the death  
18      penalty, and then talk to you about some of the laws that  
19      may apply and make sure you understand those laws.

20                                What do you think about potentially being  
21      a juror in a death penalty case?

22                    A.       I -- it's an opportunity that I really -- you  
23      don't wish to have in any way. You want to be a part of  
24      your government, helping your government out, but it's  
25      something that I would rather not be a part of, but need be.

1 Q. I think most people kind of share that  
2 opinion. You've only been in Dallas a year; is that right?

3 A. Yes, sir.

4 Q. Okay. Is this the first time that you've been  
5 summoned for jury duty since you moved here?

6 A. Yes.

7 Q. Okay. And you went right to the big time with  
8 the death penalty case, I guess?

9 A. Yes.

10 Q. What do you think about Texas so far?

11 A. I love Texas. I'm originally from Ohio. I  
12 like the weather and it's been great for me and my wife.

13 Q. Okay. And tell us what you do for a living.  
14 It looks like you've got a couple of different jobs and a  
15 student, too, right?

16 A. Yes. Right now I'm a student. I'm two  
17 classes -- well, one class away from my masters degree in  
18 management and currently I work at Lifetime Fitness. I just  
19 got the job about a week ago.

20 Q. Okay. Would it inconvenience you either in  
21 your job or in the classes you're taking to come down and be  
22 a juror in this case for two weeks in November?

23 PROSPECTIVE JUROR: It would  
24 inconvenience my classwork. If I can give them time in  
25 advance to let them know. I currently go to a campus



1 instead of online, which University of Phoenix really is an  
2 online school. So that could be a problem, but if I give  
3 them advance notice --

4 Q. Okay. So you are actually taking a class on  
5 campus this semester?

6 A. On Wednesday evenings, yes, sir.

7 Q. Okay. Do you have finals scheduled for that  
8 class? Or do you know when those are?

9 A. This is my last class, so I have a thesis  
10 right now. So there's no finals.

11 Q. Okay. Is that due anytime around November or  
12 December?

13 A. That will be due November the 19th,  
14 approximately. I'm not sure, but --

15 Q. Okay. We're scheduled to trial for the two  
16 weeks starting November 10th and then that second week, I  
17 guess, starting Monday the 17th through that week and,  
18 obviously, you have your, I guess, your very last paper due  
19 to get your degree?

20 A. Yes, sir.

21 Q. You know, we don't want to jam you up unless,  
22 you know -- we don't want to cause undue problems for  
23 people, unless we have to. But I appreciate you coming  
24 down. I think that's all the questions I have, Mr. Patton.

25 MR. WIRSKYE: Judge, I'll pass the juror

1 and I think we have an agreement.

2 MS. BUSBEE: We've made an agreement,  
3 Your Honor.

4 THE COURT: Mr. Patton, you raced down to  
5 the courthouse to tell us this. The parties have agreed. I  
6 mean, if you're in this trial, there is absolutely no way  
7 you're going to be able to get a masters thesis turned in  
8 during the middle of this trial. There's just no humanly  
9 way possible you could do that.

10 I can't let you out of trial. My deal is  
11 just, you know, wait until next semester. But the attorneys  
12 are much more forgiving of people's circumstances than I can  
13 be under the law. So we thank you for your time and service  
14 here today and they have agreed to excuse you so you can get  
15 your masters finished.

16 PROSPECTIVE JUROR: All right. Thank  
17 you.

18 [End of Volume]  
19  
20  
21  
22  
23  
24  
25

1 STATE OF TEXAS \*

2 COUNTY OF DALLAS \*

3 I, NANCY BREWER, Official Court Reporter for the 283rd  
4 Judicial District Court, do hereby certify that the above  
5 and foregoing constitutes a true and correct transcription  
6 of all portions of evidence and other proceedings requested  
7 in writing by counsel for the parties to be included in this  
8 volume of the Reporter's Record, in the above-styled and  
9 numbered cause, all of which occurred in open court or in  
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 2004.

13  
14  
15 Nancy Brewer  
16 NANCY BREWER, CSR, NO. 5759  
17 Expiration Date: 12-31-04  
18 Official Reporter, 283rd JDC  
19 Frank Crowley Crts. Bldg. LB33  
20 133 No. Industrial Blvd.  
21 Dallas, TX 75207  
22 (214) 653-5863  
23  
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25

REPORTER'S RECORD

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VOLUME 37 OF 61 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS \* IN THE DISTRICT COURT  
VS. \* DALLAS COUNTY, TEXAS  
PATRICK HENRY MURPHY, JR. \* 283RD DISTRICT COURT

\*\*\*\*\*

INDIVIDUAL VOIR DIRE

\*\*\*\*\*

**FILED IN**  
COURT OF CRIMINAL APPEALS

MAR 9 - 2004  
Troy C. Bennett, Jr., Clerk

On the 15th day of October, 2003, the following  
proceedings came on to be heard in the above-entitled and  
numbered cause before the Honorable Vickers L. Cunningham,  
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

**ORIGINAL**

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PROSPECTIVE JUROR INDEX

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P R O C E E D I N G S

THE COURT: Mr. Daigle.

[Prospective juror in]

THE COURT: Good morning, sir. How are you?

PROSPECTIVE JUROR: All right.

THE COURT: We have Nicholas Adam Daigle?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: Am I pronouncing that correctly?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: Good morning, Mr. Daigle. Welcome to the 283rd. We have juror No. 5360. Have you had enough time this morning to review the guide I provided for you?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: I also gave you a copy of your questionnaire.

PROSPECTIVE JUROR: Yes, sir.

THE COURT: I hope you've had time to review that to get you in the frame of mind this morning to think about the law we're going to be dealing with. You certainly don't have to understand it all right now. That's what this opportunity and interview is for, is for you to ask questions. The attorneys will explain the law to you,

1 give you examples to help you understand how the law works.  
2 The objective at the end is for you to have a functional  
3 working knowledge of the law.

4 I have two questions that I must ask at  
5 the end of the process. Number one is do you, in fact,  
6 understand the law? Number two, can you follow the law?  
7 That's the big picture I have to have. The only question I  
8 have for you at this time, sir, is will you be able to serve  
9 this Court for a period of two weeks beginning on November  
10 10th?

11 PROSPECTIVE JUROR: Yes, sir.

12 THE COURT: Thank you, sir. If you'd  
13 like to turn your attention to Mr. Shook, he has a few  
14 questions for you.

15 MR. SHOOK: Thank you, Judge.

16 NICHOLAS DAIGLE,  
17 having been duly sworn, was examined and testified as  
18 follows:

19 DIRECT EXAMINATION

20 BY MR. SHOOK:

21 Q. Mr. Daigle, my name is Toby Shook. I'm going  
22 to ask you questions on behalf of the State. And as the  
23 Judge said, there aren't any right or wrong answers. We  
24 just want your honest opinions. I'll talk a little bit  
25 about your information in the questionnaire and then we'll



1 talk about capital murder and that sort of thing and get  
2 your opinions and talk about some of the rules that apply in  
3 these types of cases. How long have you been here in Dallas  
4 now?

5 A. A year.

6 Q. A year. What brought you to Dallas?

7 A. Work.

8 Q. Okay. And you enjoy it here so far?

9 A. Yes, sir.

10 Q. Okay. Did you grow up in Louisiana?

11 A. Yes, sir.

12 Q. What part of Louisiana?

13 A. In Jennings.

14 Q. Okay. And I see that your father was a police  
15 officer?

16 A. Yes, sir.

17 Q. Who was he a police officer with?

18 A. Jennings.

19 Q. Okay. How long did he work there?

20 A. Two or three years.

21 Q. Okay. So he wasn't a career officer there?

22 A. No, sir.

23 Q. How old were you when he was a police officer?

24 A. Two or three years old.

25 Q. Okay. So you don't even remember those days?

1 A. No, sir.

2 Q. All right. Anything about that which would  
3 cause you to be unqualified?

4 A. No, sir.

5 Q. All right. Tell us a little bit how you feel  
6 about capital murder. You put on your questionnaire that  
7 you are in favor of it as a law?

8 A. Yes, sir.

9 Q. Could you tell us just kind of in your own  
10 words why you favor it and the purpose you feel it serves?

11 A. I just feel if you commit a crime, that you  
12 should have to pay for it.

13 Q. Okay. You just think it's a just punishment  
14 for certain cases?

15 A. Yes, sir.

16 Q. What types of cases come to mind when you  
17 think might be deserving of it?

18 A. Murder, killing of a child.

19 Q. All right. Brutal murders, that sort of  
20 thing?

21 A. Any of them.

22 Q. Okay. You checked No. 2 which the great  
23 majority of people that are in favor of the death penalty  
24 check, that you believe the death penalty is appropriate in  
25 some murder cases, and could return a verdict of guilty.

1 That's what most people put and you also put on page 3 that  
2 you agree that a life sentence should be appropriate under  
3 some circumstances, also. And that's kind of how the scheme  
4 works in Texas. In a death penalty case, if someone has  
5 been found guilty, the punishment is either going to be a  
6 death sentence or a life sentence. And it all depends on  
7 the facts and how the jury answers these Special Issues.

8 But some of the facts are going to show a  
9 life sentence as the most appropriate in a capital murder  
10 situation and some a death sentence. And it all comes down  
11 to the individual facts. From reading your questionnaire,  
12 it sounds like you are open to either alternative, depending  
13 on what the facts of the individual case are?

14 A. Yes, sir.

15 Q. Okay. Fair enough. Let me get into another  
16 area. You know, when we think of capital murder in Texas,  
17 the death penalty is reserved for intentional killings and  
18 then not every intentional killing. In fact, I guess, if we  
19 looked at it, the great majority of murders would not even  
20 fall under the death penalty statute. There are intentional  
21 murders that can be brutal. You can get a life sentence,  
22 but you can't get a death penalty.

23 The death penalty is reserved for  
24 intentional murders that occur during the course of a  
25 felony, such as robbery. If I go in a 7-Eleven and shoot

1 the clerk during a burglary, during a rape, kidnapping, and  
2 arson, also, murder of police officers, firemen, that sort  
3 of thing, murder of more than one individual, murder of a  
4 child under the age of six, but those specific  
5 circumstances.

6 And then, as I said before, some of those  
7 are going to be a life sentence and some are going to be a  
8 death sentence. It all depends on the individual facts.

9 There's another area that we call the law  
10 of parties, which I think is more commonly known among folks  
11 as accomplices. You know, sometimes it takes more than one  
12 person to commit a crime. You have accomplices. Some of  
13 them have greater roles than others and the same is true of  
14 capital murder.

15 You may have one triggerman, but you may  
16 have other accomplices that help him commit the crime. An  
17 example I use is, let's say, Mr. Wirskye and I decide we  
18 want to rob a bank. We get another friend of ours and we  
19 get him in on it.

20 Our plan calls for our buddy, he's got a  
21 fast car, he's going to drive up there, keep the car  
22 running, look out for the cops. We're going to run in  
23 there. I'm going to pull a gun out and hold everyone up.  
24 While I've got everyone threatened there, Mr. Wirskye is  
25 going to start gathering the money up and putting it in a

1 sack.

2 Then during the course of that I shoot  
3 one of the tellers. Maybe I just don't like them or maybe I  
4 think they are going for an alarm. But I murder them. We  
5 escape, but we're caught later on.

6 Obviously, I can be prosecuted for the  
7 death penalty because I murdered someone during a robbery.  
8 The law says that Mr. Wirsky and the getaway driver could,  
9 also, even though they didn't cause the death, because they  
10 were actively involved in the crime, that they participated  
11 in it. And a juror, looking at all the facts, might find  
12 them guilty and could even give them the death penalty.

13 So the law allows for that. And people  
14 feel differently. Some are in favor of the death penalty,  
15 but if it were up to them they would reserve it only for the  
16 triggerman. They might give, you know, a long prison term  
17 to accomplices. They just don't think the death penalty is  
18 right for an accomplice.

19 Then other jurors tell us they do think  
20 it could be right, that accomplices might ought to be held  
21 accountable even to a death sentence, if they are  
22 participating in the capital murder. How do you feel about  
23 that, the prosecution in a capital murder situation on an  
24 accomplice?

25 A. I think they should get life, if they didn't

1 make you pull the trigger.

2 Q. All right. And that's why we ask the question  
3 that way, because there aren't any right or wrong answers.  
4 Do you feel from your personal point of view that if it were  
5 up to you, you wouldn't have the death penalty for an  
6 accomplice. You'd just keep it for a triggerman?

7 A. I think it depends on the facts.

8 Q. Okay. What kind of facts would be important  
9 to you?

10 A. Did he force you to do it? Did he shoot the  
11 guy after you did?

12 Q. What if it's a situation where you weren't  
13 forced? If someone forced you, then that's a defense, you  
14 know, if you're doing it against your will. We can only  
15 talk about situations when it falls in a capital murder  
16 where you are going along willingly, but you may not be the  
17 actual killer. You're just participating in the event.  
18 What factors in those situations, where someone is there  
19 voluntarily, are important to you?

20 A. I guess it depends on why he was there.

21 Q. Okay.

22 A. If he did it willingly, then he should have to  
23 pay.

24 Q. Okay. The law says that under, if, like the  
25 example I gave, if we agree to commit robbery, and during

1 the course of that crime, one of us commits another felony,  
2 such as murder in that situation, then everyone can be found  
3 guilty, even if they didn't have the actual intent for that  
4 person to die, the accomplices, if the jury believes they  
5 should have anticipated that could happen, you know. They  
6 should have known that could happen. They can be found  
7 guilty.

8 So a person doesn't even have to have  
9 that actual intent. Some people agree with that and some  
10 people don't. Some people don't think that's right, that if  
11 you don't have that specific intent to murder, that you  
12 shouldn't be able to be found guilty of capital murder. How  
13 do you feel about that?

14 A. I think it depends on the evidence.

15 Q. Okay.

16 A. But if he went along with the crowd, then I  
17 guess it just depends on, are they going to be charging him  
18 for murder?

19 Q. Capital murder. Do you think if he was there  
20 voluntarily and participated in the crime, that it's fair  
21 that he be found guilty of capital murder?

22 A. Yes, sir.

23 Q. Even if he didn't actually cause the death?

24 A. (Prospective juror nods head.)

25 Q. Because he's helping commit the crime?

1 A. Right. He went along voluntarily.

2 Q. All right. Do you feel from your own personal  
3 point of view that accomplices could get the death penalty

4 --

5 A. They could, yes.

6 Q. -- if they are participating in the crime?

7 A. Yes, sir.

8 Q. Would the person's intent or what they wanted  
9 to happen be important to you?

10 A. Yes, it would.

11 Q. Okay.

12 THE COURT: I'm sorry, you are going to  
13 have to speak up. I've got to listen and she's got to  
14 record everything you say.

15 PROSPECTIVE JUROR: Yes, sir.

16 THE COURT: Thank you.

17 Q. (By Mr. Shook) Do you -- let me ask you this.  
18 You know, Louisiana I know, actually carries out the death  
19 penalty, and Texas leads the nation in carrying out  
20 executions. Some of these states have it and they never use  
21 it. But Texas does and I know Louisiana does.

22 Under the procedures, if someone is  
23 sentenced to the death penalty, they would be placed on  
24 death row. After a number of years the Judge would give an  
25 actual date of execution. And on that date or the day



1 before he would be moved from death row to Huntsville,  
2 Texas, where all executions take place by law.

3 On the date of his execution he would be  
4 given time with his family, friends, or a minister. He  
5 would be given a last meal. But at 6:00 p.m. all executions  
6 take place. They'd take him from his cell, about 18 feet  
7 away from the execution chamber. They'd put him down in  
8 that chamber, put him on a gurney, and they'd strap him  
9 down.

10 Witnesses would be brought in, some from  
11 the victim's side and some from the defendant's in different  
12 rooms. After he's secured, they put needles in his arms.  
13 The tubes go to another room where the executioner sits.  
14 He's given a time to make a last statement, which you can  
15 always read about. He might proclaim his innocence, he  
16 might rail against the death penalty, he might ask for  
17 forgiveness.

18 But at the conclusion of that, the warden  
19 would signal the executioner. He would then inject  
20 substances which would collapse his lungs, stop his heart,  
21 and within 10 to 15 seconds send him into a coma, which he  
22 would not recover.

23 That's our goal in this case. We feel we  
24 have the type and quality of evidence to convince a jury of  
25 the defendant's guilt and these questions should be answered

1 in a way that result in his execution. It's kind of one  
2 thing to talk about the death penalty, I guess, in a  
3 philosophical sense that you are for it, in favor of it.  
4 Sometimes it's something else when you come down here and  
5 you realize you might be on a jury that actually makes these  
6 decisions, makes a decision if the State proves it, that  
7 someone will be executed in the manner I've described.

8 Now, you've told us that you believe in  
9 the death penalty. And what I need to know now is this.  
10 After you have thought about it, do you think that you are  
11 the type of person that could make these decisions?

12 A. Yes, sir.

13 Q. Why do you feel that?

14 A. I feel that if you kill somebody, especially a  
15 police officer, that you should pay for it. I had a friend  
16 that was a cop and he went to the service and was shot.

17 Q. Was he killed?

18 A. (Prospective juror nods head.)

19 Q. Okay. What happened in his case?

20 A. He shot another cop.

21 Q. Okay.

22 A. He was an ex-cop that went to one of his  
23 friend's houses and they got into a big fight. And when the  
24 officer got there, he just opened up fire.

25 Q. Was he prosecuted for the death penalty?

1           A.       Yeah. He got the death penalty. He's waiting  
2 to be executed now.

3           Q.       All right. And that was back in Louisiana?

4           A.       Uh-huh, yes, sir.

5           Q.       All right. Now, our laws, once you find  
6 someone guilty, it doesn't mean they get the death penalty.  
7 Again, it might be a death or life sentence, it all depends  
8 on these questions. Question No. 1 asks whether there's a  
9 probability that the defendant would commit criminal acts of  
10 violence that would constitute a continuing threat to  
11 society. You see, that's asking the jurors to make a  
12 prediction whether they think someone is dangerous.

13                   Do you feel that you could answer that,  
14 if you are given enough evidence?

15          A.       Yes, sir.

16          Q.       What types of things would be important to  
17 you?

18          A.       Why he did it in the first place, what was his

19 --

20          Q.       Motivation?

21          A.       -- motivation.

22          Q.       All right. That would be admissible as well  
23 as the person's background, if they have been in trouble  
24 before. Now, the law says that that Special Issue starts  
25 out with a no, just like someone is presumed to be innocent

1 and we have to prove to you beyond a reasonable doubt it  
2 should be answered yes. We do that by putting on any new  
3 evidence we got in the punishment phase about the person's  
4 background and then you look again at what you heard in the  
5 guilt/innocence stage.

6 But there's no automatic answers, you  
7 know. Just because you find someone guilty, whether it's  
8 murder of a police officer or any other capital murder  
9 situation,, you don't automatically write in yes and try to  
10 give him the death penalty. We can think of a lot of  
11 examples, you know.

12 It might be a situation where, let's say,  
13 I was charged with capital murder because I broke into  
14 someone's house and murdered them. But the facts show that,  
15 well, let's use the police officer situation. Maybe it has  
16 me murdering a police officer. The facts actually show that  
17 he was molesting children in the neighborhood. But since he  
18 was a policeman, no one would do anything about it.

19 So I took the law in my own hands and I  
20 murdered him while he was on duty. And you believe that's  
21 why I murdered him. My motivations, as you said, would be  
22 so important to you. Now, I'm guilty of capital murder,  
23 obviously, under the law, because I murdered a police  
24 officer.

25 But the motivation might tell the jury,

1 well, he's never done anything else wrong in his life and  
2 his motivation was to protect children, so I don't think  
3 he's a continuing danger to society. You see how that  
4 question could be answered either way?

5 A. Yes, sir.

6 Q. That's why the law doesn't allow jurors to  
7 automatically answer yes to that, just because they found  
8 someone guilty. It just depends on the facts. Do you feel  
9 you can keep your mind open to that full range of punishment

10 --

11 A. Yes, sir.

12 Q. -- and answer that question yes or no  
13 depending on the facts?

14 A. Yes, sir.

15 Q. And would you require the State to prove to  
16 you beyond a reasonable doubt it should be answered yes?

17 A. Yes, sir.

18 Q. Okay. Same thing on Special Issue No. 2.  
19 That has to do with that accomplice situation. And it asks  
20 whether the defendant actually caused the death of the  
21 deceased. If you think he's the triggerman, then you'd  
22 answer it yes. If he didn't actually cause the death, but  
23 intended to kill the deceased or another, that is, if he had  
24 that intent, but maybe he's not the one that did the killing  
25 or he anticipated that a life would be taken.

1                   If you believe from all the facts that  
2 his anticipation was there, you know, then you would answer  
3 it yes. Again, it starts out with a no answer and the State  
4 has got to prove to you, using all the background evidence  
5 and anything about his role in the crime, that it should be  
6 answered yes. If we don't prove that to you, it has to be  
7 answered no, or left as a no. So, again, that question is  
8 answered either way just by the evidence. Do you feel you  
9 could keep your mind open to that?

10           A.       Yes, sir.

11           Q.       Just because you found him guilty, you  
12 wouldn't automatically answer that question yes?

13           A.       No, sir.

14           Q.       It would just depend on the evidence you hear  
15 in the punishment phase?

16           A.       Yes, sir.

17           Q.       Okay. And you can force the State to prove to  
18 you beyond a reasonable doubt it should be answered yes?

19           A.       Yes, sir.

20           Q.       All right. And this last Special Issue,  
21 neither side has the burden of proof. That's the mitigation  
22 question. The mitigation question allows you to look at all  
23 the evidence, the person's background, the way they were  
24 raised, brought up, to see if you think there is sufficient  
25 mitigating evidence.

1                   And that simply means evidence where you  
2 think a life sentence should be imposed rather than a death  
3 sentence. It allows you to show mercy, if you think that's  
4 the right thing to do. What you think mitigating evidence  
5 is, is going to be up to you. We can't tell you what it is.  
6 All you have to do is promise the Court you could keep your  
7 mind open to it.

8           A.       Yes, sir.

9           Q.       Do you feel you could do that?

10          A.       Yes, sir.

11          Q.       Just because you find someone guilty and you  
12 think they are a continuing danger and you think they  
13 intended someone to die, doesn't always mean they will get a  
14 death sentence. There could be some mitigating evidence,  
15 something in their background, which tells you in your heart  
16 that he needs a life sentence. You're not required to think  
17 what that would be, but you have to be able to promise the  
18 Court that you can answer the question that way, if that's  
19 what you believe the evidence showed. Could you do that?

20          A.       Yes, sir.

21          Q.       All right. You know, I had one juror explain  
22 it pretty good. He said these Special Issues are kind of  
23 like a window. It starts out with an open and every time we  
24 convince him of one should be answered, it closes a little,  
25 closes a little, and when he got to that last Special Issue,

1 it was still open. It wasn't open a whole lot, but it was  
2 still open.

3 And that's kind of how it should be. In  
4 your mind it's still open to something. And if you  
5 recognize it, you will answer at that way. As you sit there  
6 today does anything come to mind that you might view as  
7 potentially mitigating?

8 A. Not offhand.

9 Q. All right. That's what most jurors tell us.  
10 We don't anticipate that you have thought about these  
11 things. You just have to be able to tell us that you can  
12 keep your mind open to it.

13 A. I can.

14 Q. Okay. A couple of other things, then. These  
15 rules apply to all criminal cases. And you've grown up here  
16 in the United States. I'm sure you will be familiar with  
17 these. The presumption of innocence. Everyone that starts  
18 off a trial is presumed to be innocent by the jury. You  
19 have to give them that presumption. And the fact that he's  
20 been arrested or anything doesn't mean he's guilty. We have  
21 to prove him guilty by putting on witnesses.

22 Can you start this defendant out with  
23 that presumption of innocence?

24 A. Yes, sir.

25 Q. The burden of proof is on the State and it



1 never goes over to the defense. They are not required to  
2 put on witnesses or ask questions. They probably will, but  
3 they are not required to. And you can't shift that burden  
4 to them and require them to prove anything to you. If you  
5 have a reasonable doubt at any time in this trial, you'd  
6 have to find the defendant not guilty. Could you do that?

7 A. Yes, sir.

8 Q. The burden of proof goes to every element of  
9 our indictment. Our indictment is what we have to prove,  
10 it's what we write. And a juror is kind of like an umpire  
11 in a baseball game. You have to call balls and strikes as  
12 you see them. You can't give us a break, if one is kind of  
13 close, but not quite there, you can't give us a break.

14 For instance, we have to prove who  
15 committed this crime. If you had a reasonable doubt about  
16 who committed it, that's a pretty easy decision. You would  
17 find him not guilty, right?

18 A. Yes, sir.

19 Q. But the law, also, goes to where this crime  
20 happened. This is an example I don't anticipate would  
21 happen. But we have to prove this happened in Dallas  
22 County. Let's say you heard a case and you feel it's one of  
23 those close ones on the border and it actually happened over  
24 in Rockwall or Ellis County or Tarrant County.

25 That would mean you would have a

1 reasonable doubt. And under the law you are obligated to  
2 find the defendant not guilty. And some people call that a  
3 technicality, but it's not. We would have bungled the case  
4 then. You could probably have us fired for being such bad  
5 prosecutors in preparing our case, but you can't help us  
6 out. Again, you are the umpire, the neutral umpire. And if  
7 you have a reasonable doubt on any portion, even where it  
8 happened, Dallas County, you'd have to find him not guilty.  
9 Do you feel you could do that?

10 A. Yes, sir.

11 Q. Okay. The Fifth Amendment, if someone wants  
12 to testify, they can. But if they choose not to, you can't  
13 hold it against them. There's a lot of reasons why someone  
14 may not want to testify. They may not be very well  
15 educated, they may not perform well in front of people, may  
16 be real nervous, look guilty when they're not. They may  
17 just simply be following their lawyer's advice.

18 Or it could be a situation where they are  
19 real guilty and we'd make them look more guilty. The law  
20 takes care of that and the Judge says you can't hold that  
21 against them or consider it in any way. Do you feel you  
22 could do that?

23 A. Yes, sir.

24 Q. Okay. Police officers, we respect the job  
25 they do, but as jurors you have to start them out on the

1 same foot as you would any other witness. You probably know  
2 there's good police officers and then there's bad police  
3 officers. And you have to wait and judge their credibility,  
4 once they finally hit the stand. Do you think you could do  
5 that?

6 A. Yes, sir.

7 Q. The Judge would tell you on our parole laws  
8 that anyone convicted of capital murder and receiving a  
9 capital life sentence means they have to stay there forty  
10 calendar years before they become eligible for parole. He  
11 would also tell you that you can't consider our parole laws  
12 in any way in your deliberations. You just have to consider  
13 a life sentence, a life sentence. Do you think you could do  
14 that?

15 A. Yes, sir.

16 Q. All right. The bottom line is you have to  
17 keep your mind open to all these things and wait until all  
18 the evidence is in, in the punishment phase before you make  
19 these decisions. There's no automatic answers. You know,  
20 just because you find someone guilty of any type of capital  
21 murder, doesn't mean a death sentence. You can have strong  
22 feelings about the death penalty, but as a juror you have to  
23 keep your mind open and then require the State to prove  
24 everything to you. Do you feel you could do that?

25 A. Yes, sir.

1 Q. All right.

2 MR. SHOOK: That's all I have, then,  
3 Judge.

4 THE COURT: Ms. Busbee?

5 MS. BUSBEE: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MS. BUSBEE:

8 Q. Mr. Daigle, I'm not going to spend as much  
9 time talking to you, probably, as Mr. Shook, but I'd like to  
10 ask you some questions about you and about your service with  
11 us here. I know when you filled out this questionnaire, you  
12 said that you didn't know anything about this case. Have  
13 you remembered anything about it since then?

14 A. No.

15 Q. This is my concern in this matter. Could you  
16 tell me a little bit about the friend that you lost that was  
17 a police officer?

18 A. What do you want to know about him?

19 Q. Well, was he -- how close of a friend, that  
20 sort of thing.

21 A. We weren't real close. We talked when he was  
22 on duty. We didn't go hang out or anything like that. I  
23 just knew him as a friend.

24 Q. Okay. Did you attend the trial?

25 A. No, ma'am.

1 Q. All right. And you can understand my concern.  
2 I mean, people come to us with all kinds of experiences in  
3 their background and sometimes those experiences, just  
4 because we're human beings, can bleed over into our service  
5 as jurors. And while you may be a perfectly fine juror on  
6 one case, you might not be on another. There's a Judge here  
7 that uses the example of when her hubcaps were stolen off  
8 her car and then later on that morning somebody came before  
9 her who had stolen some hubcaps off a car, and she said, I  
10 just couldn't be fair because I was so mad about what  
11 happened to me that day.

12 And only you know if you can set aside  
13 your grief or your stress over what happened to your friend  
14 and be fair in a case where a police officer was killed.  
15 And if you have some reservations about that, this is the  
16 time that you can tell us that, you know, you just don't  
17 think that -- of course, you don't know what you're going to  
18 hear, but you do know that much, that that may affect you.

19 A. It wouldn't.

20 Q. It wouldn't? You can just sit here and --

21 A. Like you said, he's innocent until proven  
22 guilty.

23 Q. Okay. And then there's -- of course, as  
24 Mr. Shook explained, two aspects to this. The second part  
25 is the punishment. And I think he's told you that they're

1 trying this case under an accomplice theory, if you will.  
2 And so it's important to me to know that you'll set those  
3 feelings aside and understand that this is an entirely  
4 different individual. Can you promise me that you can do  
5 that?

6 A. Yes, ma'am.

7 Q. All right. Is there anything else that you  
8 would like to ask me about or have any questions about this  
9 case or your service?

10 A. No, ma'am.

11 Q. Okay.

12 MS. BUSBEE: Your Honor, I have no more  
13 questions of this juror.

14 THE COURT: Thank you, Mr. Daigle. If  
15 you will be so kind as to wait for us back out in the hall.  
16 We'll have you back in a few minutes.

17 [Prospective juror out]

18 THE COURT: Counsel, please approach.

19 (Bench conference)

20 THE COURT: Ms. West.

21 [Prospective juror in]

22 THE COURT: Good morning.

23 PROSPECTIVE JUROR: Good morning. How  
24 are you?

25 THE COURT: Just fine. For the record we

1 have juror No. 4895, Barbara Jane West; is that correct?

2 PROSPECTIVE JUROR: Yes, sir.

3 THE COURT: Welcome to the 283rd. Have  
4 you had an opportunity this morning to read the guide I  
5 prepared for you?

6 PROSPECTIVE JUROR: I -- um, this, sir?

7 THE COURT: Yes, ma'am.

8 PROSPECTIVE JUROR: Yes. This I have  
9 read. I didn't get to read my answers, though. I didn't  
10 have enough time.

11 THE COURT: That's fine. They may want  
12 to refer to that. They'll say, look at page, 4 what were  
13 you thinking when you filled out that questionnaire?

14 PROSPECTIVE JUROR: Oh, okay.

15 THE COURT: The idea is to let you start  
16 thinking about the issues we're going to be discussing.  
17 This is an interview process. We need to ask questions to  
18 -- the objective is for you to have a functional  
19 understanding of the law before the Court.

20 PROSPECTIVE JUROR: Okay.

21 THE COURT: There are no wrong answers.  
22 They just want your honest opinions and for you to gain the  
23 knowledge to be able to use this law. At the end of the  
24 process, I have two questions I must ask. Number one is do  
25 you, in fact, understand the law? And number two, can you

1 follow the law? Big picture. The only question that I have  
2 for you now, ma'am, is will you be able to serve this Court  
3 for a period of two weeks beginning on November 10th?

4 PROSPECTIVE JUROR: I have to answer yes  
5 or no?

6 THE COURT: Yes, ma'am.

7 PROSPECTIVE JUROR: Do I have a choice,  
8 sir?

9 THE COURT: Well, if you -- I mean,  
10 people don't want to serve for business reasons or --

11 PROSPECTIVE JUROR: Well, that's, my  
12 problem is that I am the only full-time employee at a  
13 nonprofit. And I find -- I have two weeks away from my job  
14 would be very difficult for me.

15 THE COURT: And anybody we put on this  
16 jury is going to have the same business, work-related  
17 problems. I can assure you of two things. Number one, I  
18 will not waste your time. I think you saw that. When you  
19 got here you barely had time to read your questionnaire.  
20 We're going to have you in and we're going to have you out.  
21 The trial will proceed on time. You would have a break in  
22 the morning, you'll have a lunch break, break in the  
23 afternoon. We quit between 4:30 and 5:00, depending on when  
24 the witnesses break up. So you won't be shut down. You can  
25 go by the office, if you need to, in the evening.



1 PROSPECTIVE JUROR: Well, my problem is  
2 there wouldn't be anybody there in the -- you know, in my  
3 office to be -- essentially, it would be closed. And I see  
4 that as a problem.

5 THE COURT: What is the name of your  
6 nonprofit?

7 THE COURT: It's the Creative Art Center  
8 of Dallas. It's a nonprofit school of art for adults.

9 THE COURT: So you are it?

10 PROSPECTIVE JUROR: I'm it. The only  
11 other person I have is a part-time accountant. She's  
12 sitting in for me this morning, but she's not able to be  
13 there in my stead.

14 THE COURT: Well, see, I can't let you  
15 off for legal reasons.

16 PROSPECTIVE JUROR: I understand.

17 THE COURT: But the parties have just  
18 raised a flag. And they can be a lot nicer than I am.

19 PROSPECTIVE JUROR: Okay. I'm just being  
20 honest, sir.

21 THE COURT: Well, I appreciate that,  
22 that's all we ask. See, I can't let you off, but they can.  
23 Is that correct, Mr. Wirskye?

24 MR. WIRSKYE: That is correct, Judge. We  
25 have an agreement.

1 MS. BUSBEE: We do, Your Honor.

2 THE COURT: Ms. West, you have been  
3 excused.

4 PROSPECTIVE JUROR: Well, thank you very  
5 much. I appreciate it. Thank you for considering me.

6 [Prospective juror out]

7 THE COURT: Shall we look at Porter?

8 MS. BUSBEE: Yes, sir.

9 MR. SHOOK: Sure.

10 [Prospective juror in]

11 THE COURT: Good morning, sir. How are  
12 you?

13 PROSPECTIVE JUROR: Just fine, and you,  
14 sir?

15 THE COURT: For the record, we have juror  
16 No. 5459, Lawrence B. Porter; is that correct?

17 PROSPECTIVE JUROR: Yes, sir.

18 THE COURT: Welcome to the 283rd, Mr.  
19 Porter. Did you have enough time this morning to read the  
20 guide I prepared for you?

21 PROSPECTIVE JUROR: Yes, sir.

22 THE COURT: And, also, you got a copy of  
23 your questionnaire. I hope you looked at that. The  
24 objective here is for you to use this time to gain a working  
25 understanding of the law. The attorneys are going to visit

1 with you and provide you maybe with examples to help you  
2 understand how all this law relates. That's the objective  
3 here.

4 There are no wrong answers, just honest  
5 ones. The Court will have two questions I must ask at the  
6 end of the process. Number one, do you, in fact, understand  
7 the law? Number two, can you follow the law? Big picture.  
8 Only question I have for you now, sir, is will you be able  
9 to serve this Court for a period of two weeks beginning on  
10 November 10th?

11 PROSPECTIVE JUROR: Yes, sir.

12 THE COURT: Thank you. Mr. Wirskye,  
13 would you like to inquire?

14 MR. WIRSKYE: May it please the Court?

15 LAWRENCE PORTER,  
16 having been duly sworn, was examined and testified as  
17 follows:

18 DIRECT EXAMINATION

19 BY MR. WIRSKYE:

20 Q. Mr. Porter, how are you this morning?

21 A. Fine, thank you.

22 Q. Good. My name is Bill Wirskye and I'll be the  
23 Assistant DA that will be visiting with you for the next few  
24 minutes. I'd like to talk about some of the information on  
25 your questionnaire that you were kind enough to provide for

1 us, then talk to you and get your thoughts and feelings  
2 about the death penalty and kind of explain to you the  
3 scheme we have in Texas and get your thoughts and feelings  
4 on that.

5 What do you think about coming back for  
6 an individual interview in a death penalty case? Any  
7 particular thought come to mind when you got notified to  
8 come down?

9 A. No. I thought it was part of the process.

10 Q. Okay. Tell us what you do for a living.

11 A. Um, right now, I'm the building materials  
12 manager for Service Electronics. Basically, what I do is I  
13 reverse engineer computers.

14 Q. Okay. And it looks like you've been in that  
15 type of work, computer related, for quite a while; is that  
16 right?

17 A. About eight and a half, nine years now.

18 Q. Okay. Would it cause any inconvenience or any  
19 unusual, I guess, inconvenience for you to be down here for  
20 a couple of weeks in the middle of November away from your  
21 job?

22 A. No more than going on a vacation or anything  
23 would.

24 Q. Okay. You could plan around it with enough  
25 advance notice?

1 A. Yes.

2 Q. Okay. Now, you told us you are generally in  
3 favor of the death penalty; is that right?

4 A. Yes.

5 Q. Can you tell us in your own words why you  
6 favor it or why you think we should have it in our society?

7 A. To me, capital punishment has always seemed to  
8 be effective.

9 Q. Okay. When you say "effective," what are you  
10 talking about?

11 A. An effective deterrent. Generally, places  
12 that have capital punishment have -- seems like it's lower,  
13 crime rates.

14 Q. Okay. And is that something that you, a  
15 belief you've held most of your adult life?

16 A. Yes.

17 Q. Okay. When you think about an appropriate  
18 type of case for the death penalty, what type of cases come  
19 to mind?

20 A. Generally, violent crimes where the intent was  
21 to carry out that crime through whatever means necessary.

22 Q. Okay. Would you limit the death penalty, the  
23 option of the death penalty, just to cases where life, a  
24 life was taken, murder cases? Or would you maybe have it  
25 for other cases like rape or severe child abuse, that type

1 thing?

2 A. I could see it with -- where there is  
3 sufficient justification.

4 Q. Okay. We always ask people on the  
5 questionnaire to kind of rank themselves, if they are in  
6 favor of the death penalty. You know, rank themselves on a  
7 scale of 1 to 10 how strongly they favor it. And you gave  
8 yourself an 8, which I know means different things to  
9 different people. But I'm just curious what it meant to you  
10 when you assigned yourself that No. 8?

11 A. Meant to me that I'm pretty much in favor of  
12 the death penalty where it's justified.

13 Q. Okay. Let me run another aspect, kind of, of  
14 the death penalty by you. We do this to everybody and kind  
15 of get your gut reaction to it. You know, oftentimes crimes  
16 are committed by more than one person. You can have a group  
17 or a gang of individuals who commit any crime, whether it's  
18 shoplifting or capital murder.

19 The law allows us to prosecute for that  
20 crime anyone who is actively involved in the crime. Okay?  
21 Accomplices, I think is the word you generally hear. In  
22 Texas, we call them parties to an offense instead of  
23 accomplices, but most people are more comfortable with  
24 accomplices.

25 But when you get to a capital murder type

1 scenario, you may have a situation where just one of those  
2 people actually pulled the trigger or actually caused the  
3 death of the individual during the capital murder. You may  
4 have other accomplices who are actively involved, but who  
5 didn't actually cause the death of the victim. And some  
6 people who are in favor of the death penalty oftentimes make  
7 distinctions between the triggerman and the nontriggermen  
8 accomplices.

9 And while they may favor the death  
10 penalty very strongly for the guy that actually pulled the  
11 trigger, if it were up to them, when it came to the  
12 accomplices, the nontriggermen, they'd simply take the death  
13 penalty off the table. They don't feel, for whatever  
14 reason, religious, moral, or ethical, that the death penalty  
15 is justified for those people that didn't actually take a  
16 life.

17 Other people tell us differently, it just  
18 kind of depends on the facts and circumstances of the crime,  
19 the level of involvement, that type thing. But how do you  
20 come down on that issue?

21 A. Um, I guess the best way for me to say it is  
22 if there's a group of people and they all picked up a  
23 weapon, then every one of them had the same intent, had  
24 considered the same possibility of taking that life.

25 Q. Okay.

1           A.       So --

2           Q.       So you wouldn't automatically take the death  
3 penalty off the table for the nontriggermen?

4           A.       No.

5           Q.       Okay. Let me give you an example, a factual  
6 example, just to kind of illustrate how the law works when  
7 we're talking about accomplices. Let's say Mr. Shook and I  
8 decide, we get together, that we're going to -- we agree to  
9 commit a bank robbery. The plan calls for Mr. Shook to take  
10 in our one gun. He's going to have the pistol. He's going  
11 to hold up the tellers. And while he's holding them at bay,  
12 I'm going to come in with a sack and kind of collect all the  
13 money from the cash drawer. And that's our plan. That's  
14 what we've agreed on, to do that bank robbery.

15                   Let's say during the course of that bank  
16 robbery, for whatever reason, maybe one of the tellers looks  
17 at Mr. Shook in a funny way or I see one of the tellers  
18 going to press a silent alarm to summon the police and I  
19 tell him that. But for whatever reason, he shoots and kills  
20 one of the tellers.

21                   He's committed an intentional murder  
22 during the course of a bank robbery, which is capital murder  
23 in Texas. He could be convicted of that and face the death  
24 penalty. The law also says that under that set of facts,  
25 depending on the circumstances that I, too, could be



1 convicted of capital murder and potentially face the death  
2 penalty, even though I didn't necessarily have any intent  
3 that anyone die, or even though I didn't necessarily have a  
4 weapon. What do you think about that type of scenario?

5 A. I would think that you knew that the other  
6 person was taking a weapon in, that there's a possibility  
7 that somebody could get killed. You decided to go ahead and  
8 go on with it, with the knowledge that somebody could get  
9 killed with this. So I think I would lean toward going  
10 ahead and --

11 Q. For the death penalty for the accomplice?

12 A. For the death penalty, yes.

13 Q. And I think you have just actually done a  
14 better job than I could even do of explaining the law. What  
15 the law, very frankly, is, when it comes to that person that  
16 doesn't have the intent, the law says if the person should  
17 have anticipated that a life would be taken. I think you  
18 said a possibility.

19 But if the person should have anticipated  
20 that a life would be taken, then that accomplice could be  
21 found guilty of capital murder. And if, during the second  
22 part of the trial, the sentencing phase, the jury thinks  
23 that the accomplice not only should have anticipated, but  
24 actually anticipated, then I could ultimately receive the  
25 death penalty. Does that make sense to you?

1 A. Yes.

2 Q. Okay. Is that -- it seems like you are kind  
3 of in accord with what the law is or kind of in agreement --

4 A. I think I am.

5 Q. -- on that aspect of accomplice? The reason  
6 we talk about it, very frankly, is we're prosecuting this  
7 case under that theory of law, the accomplice theory of law.  
8 And that's why we go into it in some detail, to make sure  
9 that people understand the law and are comfortable with it.  
10 It sounds like you are comfortable with that aspect of the  
11 law?

12 A. Yes.

13 Q. Okay. Let me, also, touch on another area. I  
14 think you indicated -- I'll double check -- that you, like  
15 almost everybody we talked to, has heard something about  
16 this case, the facts, I guess the pretrial publicity through  
17 the media, that type thing.

18 And in that sense it's a little bit  
19 different than most cases that you come down on in jury duty  
20 where you have absolutely no idea kind of what case it is.  
21 And we know it affects different people differently, but can  
22 you tell us what you remember hearing about this case?

23 A. I remember it being on the news where the  
24 event happened. I remember them saying they caught the  
25 people and I remember hearing that a couple of the trials

1 went on, but I never really paid any attention or heard any  
2 of the verdicts.

3 Q. Okay. So you are not aware of any of the  
4 other verdicts in the cases?

5 A. No.

6 Q. Knowing what you know, how do you think it may  
7 affect you, if you were to be a juror in this case? We ask  
8 everybody that because, I mean, you can tell us, you know,  
9 we could never figure it out. We just rely on people to  
10 tell us exactly whether they could kind of bring that open  
11 mind to this type of case where they have some previous  
12 knowledge about the facts.

13 A. Um, I don't think it would affect me much.

14 Q. Okay. What the law requires is that even if  
15 you have heard something about the case, as long as you can  
16 assure us and assure the Court that you can base your  
17 verdict just on the facts and circumstances that you hear in  
18 the courtroom, if you can do that, then you'd be a qualified  
19 juror. And it sounds like that's something that you think  
20 you could do?

21 A. Yes, I think so.

22 Q. Okay. Let me, also, ask you this. You know,  
23 we've been doing this process for a while and I talked to  
24 quite a few people and we understand that even people who  
25 come down who are kind of philosophically in favor of the

1 death penalty, or in the abstract are in favor of the death  
2 penalty, when they get down here to this point in the  
3 process, it becomes something a little bit different to some  
4 people.

5                   It's much more real. You're sitting in a  
6 courtroom, about to make it on a death penalty jury. You're  
7 looking at a living, breathing, human being defendant who,  
8 you can probably figure out, it's the goal of the DAs at  
9 this table, because we feel we have the type and quality of  
10 evidence that we think he's going to be convicted of capital  
11 murder. We feel that we have the evidence, such that he's  
12 going to be sentenced to death and one day will actually be  
13 executed.

14                   We know it's a different situation for  
15 some people. It becomes more real at this point in the  
16 process. And some people tell us they may be in favor of  
17 the death penalty, but they're simply not completely  
18 comfortable serving as a juror in this type of case.

19                   They don't want to make those type of  
20 important life or death decisions. They don't want to live  
21 with it, thinking about it, you know, after their verdict,  
22 that type of thing. Because, typically, details of death  
23 penalty cases in Texas are often reported in the media.

24                   You know living here for a while that we  
25 are the most active state. Our juries assess the death

1 penalty and it's actually carried out here, unlike some  
2 other states that have it, but never use it. It's a reality  
3 in this state. And the details of executions are often  
4 reported in the media.

5           The procedures are the same in every  
6 case. They'd be the same in this case. If these three  
7 questions that you have read about are answered, basically,  
8 yes, No. 1, he's a future danger; No. 2, he at least  
9 anticipated that a life would be taken; and No. 3, there's  
10 nothing mitigating, there's no reason his life would be  
11 spared, at that point the Judge would have no discretion.  
12 He would be automatically sentenced to death.

13           He would be immediately taken to death  
14 row where he would wait. At some point in the future, I  
15 can't tell you how long, but at some point in the future  
16 Judge Cunningham would issue a date of execution. On that  
17 date he'd be moved to the main prison in Huntsville, be kept  
18 in a small holding cell on that day just a few feet away  
19 from the actual death chamber.

20           He could meet with friends, family, spiritual  
21 advisors, could eat a last meal, if he wanted one. As it  
22 got close to 6:00, which is the time that the law mandates  
23 in Texas all executions take place, he'd be moved from that  
24 holding cell to the actual death chamber. You may have seen  
25 pictures of it. The media typically shows pictures of that

1 gurney with the leather straps.

2 But he'd be taken in there voluntarily or  
3 involuntarily. If he didn't want to go, the guards are  
4 trained to take him. He would be strapped down on that  
5 gurney. An IV would be started. There would be witnesses  
6 present from his side, also witnesses, friends, family  
7 members from the victim. The warden would give him a chance  
8 to make a last statement. He may beg for forgiveness and  
9 admit his guilt. He may proclaim his innocence, be very  
10 angry and defiant.

11 But after that, the warden would signal  
12 to the executioner. Lethal substances would be injected  
13 into that IV. Very shortly after that his heart and lungs  
14 would stop and collapse. He would fall into a coma and very  
15 quickly die.

16 And I go into that, not to be morbid with  
17 you, but just to let you know those are the type details  
18 that are often reported. Those are the procedures in any  
19 death penalty case and they'd be the same in this case,  
20 depending on the verdict.

21 But we want to make sure that each person  
22 that sits where you sit feels like they are the type of  
23 person who could take pen in hand and answer those questions  
24 in such a way that it may ultimately lead to the execution  
25 of another individual. Do you feel that you are the type

1 person that could do that?

2 A. Yes.

3 Q. Okay. Why do you say that?

4 A. I'm sorry, I'm having a little trouble  
5 answering that part of the question.

6 Q. Sure. We know it's a difficult question for a  
7 lot of people. It's not something you are normally faced  
8 with in your everyday life. We've kind of summoned you, I  
9 guess, in a sense, against your will to kind of, at least at  
10 this point in the process, participate.

11 But before we go any further in the  
12 process, we want to make sure people are -- you know, no one  
13 is going to be comfortable with it. I don't think we would  
14 want people that will be comfortable with it, but we want  
15 people that, you know, don't have hesitation, that they're  
16 the type person that actually could participate in the  
17 process.

18 And that's why we ask the question. Do  
19 you feel that you are that type of person?

20 A. Yes, I do. I've thought about it over  
21 different times and it's because I believe in the death  
22 penalty and that if that's ultimately what has to be done,  
23 then that's what has to be done.

24 Q. Okay.

25 A. I guess that's my best way to answer it.

1 Q. Okay. You feel like you could do your duty,  
2 if you had to, I guess --

3 A. Yes.

4 Q. -- as a citizen? Okay. I know you got a  
5 chance to look at these three Special Issues. The only way  
6 you'd answer these is if in the first part of the trial, you  
7 found the person guilty of capital murder. Then the second  
8 phase of the trial would start where you'd get to hear extra  
9 information about the person's past, his past history, good  
10 or bad, and then at the very end of hearing all the  
11 evidence, we ask a jury to answer these three questions.

12 Again, the first one asks, very  
13 basically, if you think the person is a continuing threat to  
14 society. It's up to us to prove it to you the answer should  
15 be yes. If that answer is yes, then you move to the second  
16 Special Issue, which kind of deals with the accomplice  
17 scenario that we talked about.

18 You would answer it yes, if you think the  
19 person was actually the triggerman. Or if he wasn't  
20 actually the triggerman, that he intended the person to die,  
21 or if he anticipated that that life would be taken, you'd  
22 answer it yes. Again, it's part of our burden to prove that  
23 to you.

24 The third Special Issue is a little bit  
25 different. Neither side has the burden. Again, that's the



1 mitigation question. It's kind of a jury's chance to show  
2 mercy, if they feel it's justified based on the facts of the  
3 crime and the facts of the person. And if that question is  
4 answered no, then that's how we get to the death sentence.  
5 At that point it would be automatic.

6 One way to look at it is if a person is  
7 convicted of capital murder, they're sitting on a life  
8 sentence. And the only way we get to the death sentence is  
9 if these questions are answered yes, yes, and no. Does that  
10 kind of make sense to you --

11 A. Yes, it does.

12 Q. -- the scheme we have? Okay. Do you have any  
13 questions at all about anything we've talked about or  
14 anything you think we ought to know before we start making  
15 decisions?

16 A. No, I don't think so.

17 Q. Okay. I appreciate your time, Mr. Porter.

18 MR. WIRSKYE: Judge, that's all I have.

19 THE COURT: Mr. Sanchez?

20 MR. SANCHEZ: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. SANCHEZ:

23 Q. How are you today, sir?

24 A. Just fine, thank you.

25 Q. You didn't expect to come down here and have

1 to answer questions like this today, did you?

2 A. No.

3 Q. Probably not the first thing you were thinking  
4 of this morning, whether you could take pen in hand and  
5 answer those questions in a way in which that would result  
6 in a death penalty being given, did you? You didn't think  
7 that you would have to answer that question, did you?

8 A. I hadn't thought about it, no.

9 Q. All right. Well, from this side of the table,  
10 you know, our -- we have to ask questions and find out about  
11 you, if you would be the kind of juror that could take pen  
12 in hand and answer those questions in a way in which they  
13 would result in a life sentence.

14 We have to find out if you are the kind  
15 of person who would feel just as comfortable in signing or  
16 answering those questions in a way in which somebody would  
17 receive a life sentence instead of a death penalty when  
18 they've been convicted of capital murder. What do you think  
19 about that?

20 A. Would you re-ask the question?

21 Q. Okay. Well, basically, you know, you have  
22 told the State that if you found somebody guilty of capital  
23 murder, you'd be able to answer those questions in a way in  
24 which that would result in the death penalty being given; is  
25 that correct?

1 A. That's correct.

2 Q. Okay. What I'm asking you is, assuming that  
3 you find somebody guilty of capital murder, the way the  
4 State has alleged it, could you feel just as comfortable  
5 answering those questions in a way if the State hadn't  
6 proved them to you beyond a reasonable doubt, in a way that  
7 would result in a life sentence?

8 A. Yes.

9 Q. You wouldn't have any problems with that?

10 A. No.

11 Q. Okay. Because, you know, there's some people  
12 that come down here and they tell us, yeah, I can be fair,  
13 if it results in the death penalty. But it may not be as  
14 fair, if I have to answer them in a way which it wouldn't  
15 result in a death penalty. You understand that?

16 A. Yes.

17 Q. Okay. But you feel you can do that, if you  
18 had to?

19 A. Yes.

20 Q. Okay. I just want to make sure that you -- is  
21 there anything that we just haven't asked you correctly or  
22 phrased it the right way that would keep you from being fair  
23 to either side in this case?

24 A. I don't think so.

25 Q. Okay.

1 MR. SANCHEZ: That's all I have, Your  
2 Honor.

3 THE COURT: Thank you, sir. Mr. Porter,  
4 if you would, wait for us outside in the hall. I'll have  
5 you back in a few minutes.

6 THE COURT: Ms. Bastardo.

7 [Prospective juror in]

8 THE COURT: Good morning.

9 PROSPECTIVE JUROR: Good morning.

10 THE COURT: For the record we have juror  
11 No. 5502, Elizabeth Bastardo?

12 PROSPECTIVE JUROR: Bastardo.

13 THE COURT: Welcome to the 283rd. Have  
14 you had time this morning to review the guide I provided for  
15 you?

16 PROSPECTIVE JUROR: Yes, sir.

17 THE COURT: And also a copy of your  
18 questionnaire?

19 PROSPECTIVE JUROR: Yes, sir.

20 THE COURT: The attorneys will visit with  
21 you and the idea is for you to have a working functional  
22 knowledge of the law. And then at the end of the process I  
23 have two questions I must ask. Number one, do you, in fact,  
24 understand the law? And number two, can you follow the law?  
25 That's the questions that I have to ask.

1                   The only question I have for you at this  
2 time, will you be able to serve this Court for a period of  
3 two weeks beginning on November 10th?

4                   PROSPECTIVE JUROR: Actually, I don't  
5 have the time, no.

6                   THE COURT: Well, nobody's got the time.  
7 We understand that. Do you have any legal reason why you  
8 cannot serve?

9                   PROSPECTIVE JUROR: No.

10                  THE COURT: Thank you so much.  
11 Mr. Shook?

12                  MR. SHOOK: Yes, Judge.

13                  ELIZABETH BASTARDO,  
14 having been duly sworn, was examined and testified as  
15 follows:

16                               DIRECT EXAMINATION

17 BY MR. SHOOK:

18               Q.       I want to ask questions on behalf of the  
19 State. And as the Judge said, we just need your honest  
20 opinions. One of the areas we go into is the death penalty,  
21 obviously. And we can't get into the particular facts. But  
22 we asked each juror how they feel about the law in general.  
23 And I believe you put on your questionnaire that you favor  
24 the death penalty as a law?

25               A.       Yes, sir.

1 Q. Would you tell us kind of in your own words  
2 why you favor the death penalty?

3 A. Well, I feel that if somebody is heinously  
4 killed or seriously hurt, that the accused should be  
5 punished to death.

6 Q. Okay. What types of cases do you think are  
7 appropriate for the death penalty?

8 A. When someone is killed.

9 Q. Any kind of murder case or is there a  
10 particular kind?

11 A. Maybe not any kind.

12 Q. What kind of factors do you think are  
13 important in those types of situations?

14 A. A person that's killed, how they are killed.

15 Q. Okay. Have you followed any cases in the  
16 media that you think would be a death penalty case or at  
17 least consideration, either locally or nationally?

18 A. Yes, I have.

19 Q. What types of cases are those?

20 A. This particular case.

21 Q. This particular case?

22 A. (Prospective juror nods head.)

23 Q. What do you remember about this case?

24 A. I've watched the whole thing on the Discovery  
25 Channel a couple of times, so.

1 Q. The documentary they had?

2 A. Uh-huh.

3 Q. Okay.

4 A. And the local news as well.

5 Q. All right. Did you follow any of the cases as  
6 they were actually tried?

7 A. No, I just watched the whole -- the overall of  
8 them on the Discovery Channel.

9 Q. When it happened and the background they gave  
10 on the Discovery Channel?

11 A. I've seen the Discovery Channel thing twice  
12 and then just, you know, clips on the local media whenever  
13 they were being arrested.

14 Q. Now, would that -- just because you have seen  
15 something on TV, doesn't necessarily disqualify you. But,  
16 obviously, you may have seen more than other jurors. Kind  
17 of the bottom line is whether that would influence you in  
18 your decisions ahead of time. Because the rule is if you  
19 make it onto the jury, obviously, you have to make your  
20 decisions just based on what you hear in the courtroom.

21 We can't ask you to forget about what  
22 you've seen, but we can ask you, and you are required by  
23 law, to make your decisions only from what you hear from the  
24 witness stand. But only you know yourself best and know  
25 what you've seen and the opinions you've formed.

1                   From what you've seen on TV and the  
2       Discovery Channel, do you feel that could influence your  
3       decisions in the case?

4           A.       Yes, sir.

5           Q.       Okay. And you can't assure the Court that you  
6       could put those out of your mind?

7           A.       I don't think I could.

8           Q.       All right. Fair enough, fair enough. You  
9       also said you knew some lawyers and judges?

10          A.       Yes, sir.

11          Q.       And I believe you have a cleaning service?

12          A.       Yes, sir.

13          Q.       Any criminal judges?

14          A.       Um, yes, my personal criminal judge -- I mean,  
15       not judge, attorney. I currently don't work for any judges.  
16       I've worked for judges in the past.

17          Q.       All right. Other than just your regular  
18       personal attorney, then, that's the only one you know?

19          A.       I have another attorney that I work for as  
20       well.

21          Q.       Okay. But you -- and that's Scott Palmer?

22          A.       Yes, sir.

23          Q.       Who is down here quite a bit. I think we all  
24       know him. But the bottom line is, can't tell the Court that  
25       you could put the opinions you formed from what you have



1 seen on TV out of your mind?

2 A. I don't think I could. I've seen the  
3 Discovery thing twice and they pretty much made my opinion  
4 for me.

5 Q. Would that be your opinion that the defendant  
6 would be guilty?

7 A. I believe he is.

8 Q. Okay. Fair enough, then.

9 MR. SHOOK: That's all the questions I  
10 have.

11 MS. BUSBEE: No questions, Your Honor.

12 THE COURT: The parties agree?

13 MR. SHOOK: We can agree, yes, sir.

14 MS. BUSBEE: Yes, sir.

15 THE COURT: Ms. Bastardo, we appreciate  
16 you coming down. Until we actually visit with everybody, we  
17 can't fully understand everything from the questionnaire and  
18 we appreciate your time and service to this Court, but you  
19 are not going to be seated on this jury.

20 PROSPECTIVE JUROR: I appreciate it,  
21 thank you.

22 [Prospective juror out]

23 THE COURT: For the people we've  
24 interviewed this morning, the parties have agreed to excuse  
25 juror No. 4895, the lady that worked for the nonprofit. The

1 next juror in order is 5360, Mr. Daigle. As far as  
2 qualifications, what says the State as far as Mr. Daigle  
3 being qualified?

4 MR. SHOOK: We feel the juror is  
5 qualified. We have no challenges for cause.

6 MS. BUSBEE: Defense has no challenge for  
7 cause.

8 THE COURT: The Court finds Mr. Daigle to  
9 be qualified. What says the State?

10 MR. SHOOK: State will accept the juror.

11 MS. BUSBEE: We have no choice, Your  
12 Honor. We have no strikes left. I petition the Court for  
13 an additional strike. I would strike this individual, if I  
14 was given an additional strike pursuant to my previous  
15 requests for strikes on the under the same grounds as I  
16 previously requested extra strikes.

17 THE COURT: Motion denied. Mr. Daigle  
18 shall be seated as juror No. 14. Once again, I'm not going  
19 to inform him that he is an alternate. He will be seated as  
20 any other juror and will not know that. I'm not even  
21 telling him that the jury selection has been completed. I  
22 going to say we will continue and he'll receive a letter to  
23 reappear. Go off the record.

24 [Off the record]

25 THE COURT: Ask Mr. Porter to come back

1 in.

2 [Prospective juror in]

3 THE COURT: Mr. Porter, we want to thank  
4 you for your time and service to the Court today. I'm going  
5 to inform you that you shall not be seated on this jury. So  
6 your jury service is now concluded.

7 [Prospective juror out]

8 THE COURT: Mr. Daigle.

9 [Prospective juror in]

10 THE COURT: Thank you, you may be seated.  
11 Mr. Daigle.

12 PROSPECTIVE JUROR: Yes, sir.

13 THE COURT: Sorry for the delay in  
14 getting you back in, but we needed to talk to some other  
15 folks this morning. And I have some news for you. You have  
16 been seated on this jury.

17 PROSPECTIVE JUROR: Yes, sir.

18 THE COURT: Now the hard part begins.  
19 You already told us that you don't know much about this  
20 case, if any at all. You need to keep it that way.

21 PROSPECTIVE JUROR: Yes, sir.

22 THE COURT: What do you think will happen  
23 when you go back to work and tell them you have been seated  
24 on a capital murder case?

25 PROSPECTIVE JUROR: I've already talked

1 to them. They knew I was coming up here.

2 THE COURT: They knew you were coming up  
3 here for an interview, but they didn't know you were coming  
4 up here to be potentially -- and now you are seated on this  
5 jury.

6 PROSPECTIVE JUROR: Yes, sir.

7 THE COURT: What do you think is going to  
8 happen when you go back and tell them I'm on a capital  
9 murder case. I need two weeks.

10 PROSPECTIVE JUROR: They will give it to  
11 me.

12 THE COURT: I know they'll give it to  
13 you, but they will also talk to you about it.

14 PROSPECTIVE JUROR: I don't know.

15 THE COURT: What I'm telling you, sir, is  
16 these attorneys and the parties in this matter are satisfied  
17 with your opinions.

18 PROSPECTIVE JUROR: Yes, sir.

19 THE COURT: You go back to the shop and  
20 you start talking to the guys down there and they are going  
21 to offer their opinions.

22 PROSPECTIVE JUROR: Uh-huh.

23 THE COURT: You see? They are going to  
24 say, well, if I were down there, I would do X. Well,  
25 they're not down here, they haven't been through the drill,

1 they haven't filled out the questionnaire, and they haven't  
2 answered the attorneys' questions. So we want you to  
3 understand the law. The law is you will judge this case  
4 from evidence you hear from that witness stand that you are  
5 sitting in right now.

6 PROSPECTIVE JUROR: Yes, sir.

7 THE COURT: That's it. Period. No  
8 newspaper, no Internet, no visiting with friends, no  
9 information from any other source, don't even talk about it.  
10 When this case is over, you can talk to whomever you choose,  
11 as long as you want to, about this experience. Prior to  
12 that, nothing. It's real simple.

13 Obviously, you are going to have to tell  
14 your employer, the Judge has ordered me to return to court  
15 for a trial beginning on November 10th. Also, we're going  
16 to have another hearing prior to that, once we get this jury  
17 selection complete. Once I have all the jurors in the box,  
18 we're going to have everybody back down here on Halloween.  
19 That's Friday, October 31st. Probably be like at 10:00.

20 It will be about a one-hour hearing. And  
21 the reason I do that is once I -- there are certain things  
22 that I cannot do until I get everybody here. So once I get  
23 everybody in the box, then I will go through an additional  
24 procedure from this trial. Then the Sheriff will spend some  
25 time with you after they get everybody together.

1                   The reason I do that is twofold. The  
2 first day of trial people are nervous. I don't know who --  
3 you know, everybody, so this is really a jury orientation  
4 day. And it allows me to go through some legal procedures I  
5 need to do. Because when we hit the ground running on  
6 Monday morning, November 10th, the jury will be in the box  
7 at 8:30 and the State will present their indictment.

8                   Not like you hear on TV where, you know,  
9 the jury comes in at 8:00 and they don't start court until  
10 10:00. It won't happen. I am not going to waste your time.  
11 So that's what the additional hour will be on Halloween, is  
12 I'm going to save a lot more time on that Monday morning.  
13 Monday mornings are always tough. So we get here and we get  
14 started on time.

15                  Now, I'm going to print some documents  
16 for you here in a minute, some written instructions as to  
17 what I just told you orally. Don't have any communication  
18 with the parties. If you see one of the attorneys or the  
19 Court Reporter or myself back here in the back hallway where  
20 the jury room is, I will be rude to you. You are not going  
21 to get so much as a good morning out of me.

22                  There's an absolute reason for that.  
23 It's called the appearance of impropriety. If I'm talking  
24 to someone and another person oversees the conversation that  
25 they can't hear, they don't know if I'm talking about the

1 case or you are asking, what's for lunch? You follow me?

2 PROSPECTIVE JUROR: Yes, sir.

3 THE COURT: So it's just real, real  
4 simple. I avoid the appearance of impropriety completely.  
5 Now, who do you get to talk to?

6 PROSPECTIVE JUROR: Nobody.

7 THE COURT: The Sheriff. She's in charge  
8 of the jury over here. That's her job. She will answer the  
9 questions that she can. If she cannot answer a question,  
10 she will forward that question to me and I may be able to  
11 answer the question. But that's how we do this. She's the  
12 insulation, she's the barrier between the parties and the  
13 jury.

14 So that's what we're talking about.  
15 That's how much -- I'm real serious about not having any  
16 information about the case. You have told us that you will  
17 judge this case from the witness stand. Sequestered, do you  
18 know what "sequester" means?

19 PROSPECTIVE JUROR: Not really.

20 THE COURT: Many people are concerned  
21 will they be going home at night? You will not be  
22 sequestered or locked up as a jury in a hotel during the  
23 trial, provided the jury can follow my instructions. If I  
24 think jurors are not doing what they should be doing, then I  
25 will put them in a hotel for two weeks. You don't want

1 that. And I don't foresee that to be a problem.

2 Now, you might be sequestered overnight  
3 after the jury has received the Court's charge. What  
4 happens is after the trial is over and the attorneys argue  
5 their case to the jury, and the jury goes back with the  
6 written charge in their hand, and the door is closed and you  
7 begin to make a decision in this case, at that point before  
8 the decision is made, the jury may not separate.

9 So if it takes a jury, you know, all day  
10 and then 5:00 rolls around and they are not through, then  
11 the Sheriff will give you a warning to bring extra clothes  
12 that day. You will know what day that will be. But at that  
13 point you would not be allowed to separate. So you could  
14 potentially be sequestered on the last day of trial.

15 Now, if it takes you one day or a week to  
16 make a decision, that's your business. Now, in California  
17 they had a jury stay out four months. So that's California.  
18 That's -- I'm just trying to give you an idea to answer some  
19 of your questions that you may have. I do not anticipate  
20 that you would be sequestered. It's possible during the  
21 deliberations, depending on how long it takes the twelve  
22 people to make a decision.

23 Now, I know we've given you a lot of  
24 information and this is the last time you have an  
25 opportunity to ask me a question.



1 PROSPECTIVE JUROR: Is it required that  
2 my job pay me while I'm out?

3 THE COURT: It's not required by law, but  
4 you can tell them that it's highly encouraged that your  
5 employer does the right thing by your service to the  
6 citizens of Dallas County. You can use my words. You can  
7 say, the Judge highly encourages the employer to help in  
8 this process. There's no point in you having a financial  
9 hardship for you being asked to do your civic duty. Fair  
10 enough?

11 PROSPECTIVE JUROR: Fair enough.

12 THE COURT: Good question. Anything  
13 else?

14 PROSPECTIVE JUROR: Are they going to  
15 send another letter showing that we have to come back on the  
16 31st?

17 THE COURT: Yes, sir. You will receive  
18 another letter. I find that helps people with their work.

19 PROSPECTIVE JUROR: Yes.

20 THE COURT: And you will receive another  
21 letter in the mail.

22 PROSPECTIVE JUROR: What about for saying  
23 that we've been chosen as for the jury? Are they going to  
24 give a letter for that?

25 THE COURT: It'll be in the same letter.

1 The letter will state, you know, Dear Sir or Madam, you have  
2 been impaneled as a juror in this case and we need a short  
3 hearing on October 31st following -- preceding the trial  
4 date of November 10th. Please arrange your schedule  
5 accordingly to be available for the Court for two weeks.  
6 That way your employer can look at that and it will be  
7 covered in all four corners and you're set to go. Fair  
8 enough?

9 PROSPECTIVE JUROR: Fair enough.

10 THE COURT: If you would be so kind as to  
11 go with the Sheriff. She has some information to provide  
12 you and I'll get those documents for you in just a minute.

13 [End of Volume]  
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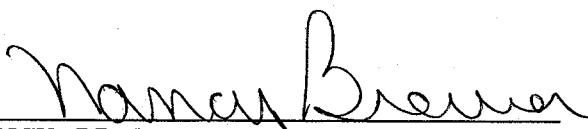
1 STATE OF TEXAS \*

2 COUNTY OF DALLAS \*

3 I, NANCY BREWER, Official Court Reporter for the 283rd  
4 Judicial District Court, do hereby certify that the above  
5 and foregoing constitutes a true and correct transcription  
6 of all portions of evidence and other proceedings requested  
7 in writing by counsel for the parties to be included in this  
8 volume of the Reporter's Record, in the above-styled and  
9 numbered cause, all of which occurred in open court or in  
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 2004.

13  
14  
15   
16 NANCY BREWER, CSR, NO. 5759  
17 Expiration Date: 12-31-04  
18 Official Reporter, 283rd JDC  
19 Frank Crowley Crts. Bldg. LB33  
20 133 No. Industrial Blvd.  
21 Dallas, TX 75207  
22 (214) 653-5863  
23  
24  
25

REPORTER'S RECORD

74851

VOLUME 38 OF 61 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS \* IN THE DISTRICT COURT  
VS. \* DALLAS COUNTY, TEXAS  
PATRICK HENRY MURPHY, JR. \* 283RD DISTRICT COURT

\*\*\*\*\*

JUROR ORIENTATION

AND

PRETRIAL

\*\*\*\*\*

**FILED IN**  
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 31st day of October 2003, the following  
proceedings came on to be heard in the above-entitled and  
numbered cause before the Honorable Vickers L. Cunningham,  
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

**ORIGINAL**

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WITNESS INDEX

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Patrick Murphy	68,87	75	82	38

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P R O C E E D I N G S

THE COURT: The Court has instructed all the jurors to return today for their orientation as a whole. For the parties' benefit, the Court will go over, once again, the instructions. I shall read the instructions to them to be sure they understand the seriousness of following the orders of the Court. We'll go over the qualifications of the jury service, once again, to be sure that none of them have any issues relating to court qualifications.

Prior to bringing in the jury, does the State have anything to put on the record at this time?

MR. SHOOK: No, sir.

THE COURT: Ms. Busbee?

MS. BUSBEE: Yes, Your Honor. Just to make the record abundantly clear, that juror No. 12 was seated and she was considered by the defense an objectionable juror, but we had run out of peremptory challenges and my request for additional peremptory challenges was denied by the Court.

THE COURT: That's correct.

MS. BUSBEE: And, Your Honor, we reviewed the instructions that you plan to read to the jury and we have no objections or additions or deletions.

THE COURT: At this time I go through and I open it up for any questions they may have. Who knows

1 what they may bring up today, but I'd rather get it out of  
2 the way today --

3 MS. BUSBEE: Than get it in a note.

4 THE COURT: Yeah, than get it in a note  
5 later or something. So we have time to cure.

6 [Off the record]

7 (Jury in)

8 THE COURT: Good morning. Please be  
9 seated. Welcome back to the 283rd. Sorry for the delay.  
10 You know I like to get started on time and I will tell you  
11 why we have a delay, so I can tell you why we're using your  
12 time.

13 We had previously had one of the jurors  
14 tell us that he was out of town today and I knew about that  
15 prior to this hearing. And as I told you, we schedule a  
16 day. I couldn't tell you when it was and he was out of  
17 town. And the other man turned up that they had to move  
18 their home today, being the last day of the month. So he  
19 couldn't be here, either. But we didn't find that out until  
20 this morning; otherwise, we would have been here at 10:00,  
21 so we would not waste your time.

22 So I hope that will be the last delay  
23 that we have in this court, because that's why we bring you  
24 in today. I know you look at it, I missed half a day's  
25 worth of work and I could be doing other things more



1 productive. But I think when we do it individually, you  
2 finally come together as a group, it gives you an  
3 opportunity to meet each other and get those issues out of  
4 the way before you come in day one under the pressure of the  
5 trial.

6                   There are a few things that I want to go  
7 over with you this morning and then I will turn it over to  
8 the Sheriff. I know you will get tired of me saying this,  
9 but that's the way it's going to be. I have already given  
10 you the instructions once in writing when you left here  
11 individually. I'm now going to read to you these  
12 instructions aloud, so you can follow along, just so there  
13 are no questions as to the instructions.

14                   Do not mingle with or talk to the  
15 lawyers, the witnesses, or parties or any other person that  
16 might be connected with or interested in this case except  
17 for casual greetings. They will have to follow the same  
18 instructions so you will understand it when they do. I know  
19 I told each of you that I would probably be rude to you if I  
20 saw you in the back hallway and I will be rude until this  
21 trial is over. You might get a hello, but I doubt it. And  
22 you know why.

23                   Do not accept from or give to any of  
24 those persons any favors, however slight, such as rides,  
25 food, or refreshments. These are general instructions that

1 everybody gets. We won't have those issues here.

2 No. 3, do not discuss anything about this  
3 case or even mention it to anyone whomsoever, including your  
4 wife or husband, nor permit anyone to mention it in your  
5 hearing until you are discharged as jurors or excused from  
6 the case.

7 I gave each of you those instructions  
8 about work, family, people, offering their opinions to you.  
9 Once again, at this point, if anyone attempts to discuss  
10 this case, report it to me at once and that means report it  
11 through the Sheriff because we can't talk.

12 As I have already told you, don't tell  
13 anyone you have been selected in a capital murder case.  
14 Just arrange to have your schedule accommodated for this  
15 trial to begin Monday the 10th.

16 Do not even discuss this case among  
17 yourselves until after you have heard all the evidence, the  
18 Court's charge, the attorneys' arguments, and until I have  
19 sent you to the jury room to consider your verdict.

20 Now, what that means is you really can't  
21 go in at the conclusion of any witness and start talking  
22 about this case, just you can't do that. You have to have a  
23 complete picture. That's what Ms. Brewer does is she  
24 provides a transcript, if necessary, and we'll get to those  
25 notes in just a minute. You have to listen to everything

1 before you start talking about this case.

2 Do not make any investigations about the  
3 facts of this case. We have had, and I will say  
4 occasionally, we have had a juror who privately seeks out  
5 information about a case on trial. This is improper. All  
6 evidence must be presented in open court so each side may  
7 question the witnesses and make proper objections. This  
8 avoids a trial based upon secret evidence. These rules  
9 apply to the jurors the same as they apply to the parties  
10 and to me. If you know of or learn anything about this case  
11 except the evidence admitted during the course of this  
12 trial, you should tell me about it at once, once again,  
13 through the Sheriff.

14 On Monday morning the 10th you will take  
15 an oath that you will render a verdict on the evidence  
16 submitted to you under my rulings. Do not make personal  
17 inspections, observations, investigations, or experiments,  
18 nor personally view premises, things, articles, not produced  
19 in court.

20 Do not make any investigation or conduct  
21 any internet research on this or other cases involving  
22 capital murder. Do not let anybody else do any of these  
23 things for you.

24 Do you want tell other jurors your own  
25 personal experiences nor those of any other person nor

1 relate any special information. A juror may have special  
2 knowledge of matters such as business, technical, or  
3 professional matters or may have expert knowledge or  
4 opinions or he may know what happened in this or some other  
5 lawsuit. To tell the jurors any of this information is a  
6 violation of these instructions.

7 Do not seek any information contained in  
8 lawbooks, dictionaries, public or private records or  
9 elsewhere which are not admitted into evidence. At the  
10 conclusion of all the evidence, I will submit to you a  
11 written charge.

12 Since you will need to consider all the  
13 evidence admitted by me, it's important that you pay close  
14 attention to the evidence as it is presented.

15 Texas law permits proof of any violation  
16 of rules of proper jury conduct. By this I mean that jurors  
17 or others may be called upon to testify in open court about  
18 jury misconduct. I'll read that again. By this I mean that  
19 jurors and others may be called upon in open court to  
20 testify about jury misconduct.

21 I instruct you, therefore, to carefully  
22 follow all these instructions that I have given you, as well  
23 as others that you may receive while this case is on trial.

24 Once again, the contact information is on  
25 the back of this sheet. You have parking. You can get your

1 parking validated today. And you won't have an issue after  
2 that. And you say, well, why did you put general  
3 qualifications for jury duty? It's in the past we've had  
4 jurors who have been arrested from the time they were  
5 selected before we started the trial. So I will go through  
6 this again to be sure everybody is still qualified.

7 I know each of you are 18. Has anyone  
8 moved outside of Dallas County? Mr. Engles may be able to  
9 avoid jury service if he moved outside of Dallas County.  
10 Still qualified to vote in this county that you are going to  
11 serve. You don't have to be registered to vote. You have  
12 already gone over No. 4 of sound mind and good moral  
13 character. We know that you can read and write. We know  
14 you have not served on a jury. But here's the key, nobody  
15 has been convicted of a felony and no one is under  
16 indictment or other legal accusation of misdemeanor or  
17 felony theft or any other felony?

18 Anybody been arrested since we talked to  
19 you last time? It has happened. Okay. Anybody have  
20 qualification issues? I see none.

21 Okay. Notes. I believe I saw in the  
22 jury room the Sheriff has provided a clipboard and notepads  
23 for you. I have always encouraged the jury to take notes.  
24 Why? What am I doing? One of the things that you want to  
25 know is what am I doing on this computer all day? You saw

1 me on the computer when we were doing voir dire and I told  
2 you, I'm not playing, you know, asteroids, as my brother  
3 says, on the computer. That doesn't happen. I wish I could  
4 turn it around. It's not going to work.

5 I'm keeping notes all day long as -- she  
6 keeps a word-by-word testimony. She can read back word by  
7 word of anything anyone says. I'm keeping a summary of the  
8 witnesses, so I can keep things straight in my mind as to  
9 who has testified, a summary of their testimony, and then  
10 I'm making my legal issues and summaries for my benefit when  
11 I have to make rulings.

12 I encourage you to do the same thing,  
13 however you want to do it. Why? It keeps you -- you're  
14 focused, it helps you remember major points or whatever the  
15 witnesses is testifying to. We allow you to take notes as  
16 long as they are your notes, which means you can't share  
17 them with someone else.

18 Now, then you say, well, can I use them  
19 in deliberations? If the parties say, Judge, we want you to  
20 take up the jurors' notes at the end of the trial, at the  
21 end of the evidence that has been presented, the law is that  
22 the parties say, we want you to take their notes up.

23 You say, Judge, why are you saying I  
24 should take notes when you are taking them away from us? I  
25 don't know if they will be taken up. They can be taken up,

1 because she is the official notetaker. It may also help  
2 you, you know, when you are looking at an issue, this is  
3 something that I need to have answered. I dispute as to the  
4 testimony.

5           The only way that we can provide  
6 testimony to you, you can't say, well, Judge, we would like  
7 to have witness X, her testimony read back to us. It can't  
8 happen. What has to happen is the jury has to go back and  
9 when they start talking about the case and they have a  
10 dispute about the testimony or evidence that was presented  
11 by a particular witness, you have to frame your question  
12 this way. We, the jury, are in dispute about was the truck,  
13 you know, green or blue or brown or black or gray from  
14 witness X's testimony. And she has to go and search the  
15 whole record, the whole testimony, and provide you the  
16 answer to a very specific question.

17           So even though we're computer literate  
18 and we have a realtime record, you still cannot have a  
19 general rereading of testimony. So that helps you  
20 understand the rules of what the jury is allowed to have  
21 going into it. So that's why I say you have to pay  
22 attention. Taking notes helps you pay attention.

23           Should the jury have a dispute as to an  
24 issue or the testimony, then you can have an answer provided  
25 to a specific question. But it has to be a very narrow,

1 specific question. After a trial you can have your notes  
2 back. Some people want their notes back. You are welcome  
3 to have them. But, there again, the parties control whether  
4 or not you have the notes during deliberations, because  
5 she's the official notetaker. That way we have one accurate  
6 record versus 14 people making their own individual notes.  
7 So that's how that works.

8 For those of you who may not remember,  
9 I'm going to introduce the parties again for you so you can  
10 -- I've got a note from the Sheriff that you wanted copies  
11 of the pictures, which I think is good. I want you to get  
12 to know each other. We know who you are and that's why we  
13 brought everybody together.

14 I'll introduce the parties again. For  
15 the State you have got Mr. Toby Shook, Bill Wirsky. I  
16 don't know if either or both were here at the time that you  
17 were interviewed. Lisa Smith is also an attorney for the  
18 Dallas DA's Office.

19 Remember Brook Busbee, Juan Sanchez for  
20 the defense, and John Tatum is here. He's also an attorney  
21 representing the defendant, Mr. Murphy, on the end.

22 So those are the folks that will be here  
23 in trial. That way you can see -- this is what you will see  
24 when you walk in on Monday morning. Once again, we'll start  
25 at 8:30. So whatever time the Sheriff tells you to be here



1 and ready to go, we'll have you in the box and the State  
2 will -- at that time I will swear you in as a juror. Then  
3 the State will present their indictment and then the  
4 attorneys will give an opening summation of what they  
5 believe the evidence will show in this case. And then they  
6 will call a witness for the State and we'll proceed with  
7 testimony.

8 That's why we're doing all this now so  
9 that when we go to work on Monday morning, we're not going  
10 to waste any of your time.

11 Now, this is the last time -- excuse me,  
12 parties, anything I need to cover?

13 MS. BUSBEE: I'm satisfied, Your Honor.

14 MR. SHOOK: No, sir.

15 THE COURT: This is the last time you can  
16 ask a question in open court. They have to read your mind  
17 from this point forward when they present their testimony.  
18 If you have any questions of me, procedure, how things are  
19 going to work, we're all ears. But Monday morning it's just  
20 we have got to read your mind.

21 I know somebody has got to have a  
22 question. I haven't thought of everything. I have 12 happy  
23 people ready to go trick or treating tonight. Okay. Last  
24 chance. Anything that we -- yes?

25 JUROR: If we need to take a break, say

1 to go to the men's room or something, how do we -- how is  
2 that handled?

3 THE COURT: Please, you know, flag the  
4 Sheriff or get my attention. You can see -- you will see I  
5 drink water all day long and I can drink about two to three  
6 of these and it doesn't phase me. So I sit here all day.

7 So you have got to tell me. I usually  
8 work about an hour and a half. Give you an idea, we will  
9 start at 8:30, take a break somewhere around 10:00, 10:20,  
10 10:15 for 15 or 20 minutes and then work from 10:30 or  
11 around that until noon or until the lunch caterer brings the  
12 lunch in for you.

13 So if I have a witness that's concluded  
14 at 11:50, we'll go ahead and break early. And if the  
15 caterer brings the lunch in, I'll raise the flag and we will  
16 break. We will get you in and get you back out. It takes  
17 an hour or less for lunch. That's why we bring it in. And  
18 we'll go back to work and take a break of 15 or 20 in the  
19 afternoon. And if you need one in between then, just get my  
20 attention, get the Sheriff's attention, and we'll take a  
21 quick one.

22 But you have one in the morning and one  
23 in the afternoon. Anybody smoke? Nobody smokes? We  
24 understand. The Sheriff smokes, so they will have to take  
25 you outside and get that, so we understand. You will have a

1 smoke break in the morning and one at noon and one in the  
2 afternoon. Yes, ma'am?

3 JUROR: Can we bring bottled water in the  
4 courtroom?

5 THE COURT: Please. You will find the  
6 Sheriff will provide refreshments for you in there. Like I  
7 say, I drink water all day. So you are welcome to bring  
8 water in the courtroom. They will have coffee for you in  
9 the back. But we try not to bring -- I call them colored  
10 drinks into the courtroom because water is easy to clean up,  
11 and everything else is a mess. And trying to get the county  
12 to clean something up, it just doesn't happen. So we just  
13 bring water in. Yes, you can bring bottled water into the  
14 courtroom. No problem. Yes, ma'am?

15 JUROR: Will there be people in the  
16 audience or is it just going to be these people?

17 THE COURT: Yes. There will be people in  
18 the audience and there -- I don't know. I would anticipate  
19 there may be media and I think I went over this, I don't  
20 know how many times, but you can probably anticipate a news  
21 report. We call it a pretrial news article. Don't read it.  
22 Do not read it.

23 If you see TV cameras in the courtroom, I  
24 do allow cameras in the courtroom. The rule is they may not  
25 take your picture at any time. If they take -- if they even

1 think about taking a juror's picture, that cameraman will be  
2 held in contempt. So I'm real serious about that.

3 Also, if I have to refer to a juror on  
4 the record at some point in time, I always just use the last  
5 name. That way we don't know if it's a male or female.

6 And, there again, it goes back to I'm being rude, but  
7 there's a reason for that. So I will say juror Smith. So  
8 that's a reason for that. So there's no issue as to who it  
9 might be. I try to keep it as anonymous as we possibly can.

10 The camera will be taking the testimony  
11 of a witness. But they will block it out and not get anyone  
12 on the jury. We have not had a problem in the past, so it's  
13 not an issue. Yes, it will be there and you are instructed  
14 not to look at it. Good question.

15 Anyone else? If you think of something  
16 in the back, you can ask it today, but not Monday. Okay.  
17 Go with the Sheriff. We appreciate you being here. Sorry  
18 for the delay in getting started and the Sheriff will have  
19 other issues to go over with you. Thank you very much.

20 [Jury out]

21 THE COURT: We're on the record. We'll  
22 go through the motions filed by the defendant. Motion No. 1  
23 is a motion to quash the indictment. Any oral arguments?

24 MR. SHOOK: No, sir.

25 MR. TATUM: I think it pretty well speaks

1 for itself, Your Honor, other than it goes to the point of  
2 the burden of proof that the Supreme Court has placed on the  
3 State of Texas when they seek a death penalty, Enmund versus  
4 Florida, for nonshooters or people who do not actually  
5 engage in the killing act, that there's an additional burden  
6 of proof that the Supreme Court has placed on all the states  
7 is whether the defendant intended or contemplated that a  
8 life be taken and that the defense feels like that because  
9 of that burden of proof, it needs to be placed in the  
10 indictment for adequate notice purposes and as part of their  
11 burden of proof that should be there.

12 THE COURT: The Court has read the  
13 motion. Motion denied. No. 2, Motion to Declare Capital  
14 Sentencing to be Unconstitutional. Very well written and  
15 encompassing issues all Penry and a lot of other issues  
16 here.

17 Is there anything else, Mr. Tatum, that  
18 you haven't put in this motion?

19 MR. TATUM: No, sir.

20 THE COURT: But on No. 2.

21 MR. TATUM: No. I feel the State's  
22 position, they need a subparagraph as to constitutional  
23 arguments, Your Honor.

24 THE COURT: Motion 2 is denied. Motion 3  
25 to set aside the indictment because of the

1 unconstitutional of the statute. Any additional issues?

2 MR. TATUM: No additional issues, Your  
3 Honor.

4 THE COURT: The Court has read and  
5 researched that motion and motion 3 is denied. Motion 3-A,  
6 Motion to Hold Unconstitutional Article 37.071, Section 2(e)  
7 and (f), basically special issues. Anything else?

8 MR. TATUM: No, Your Honor.

9 THE COURT: Motion 3-A is denied. Motion  
10 4, Discover What Facts the State Intends to Rely Upon in  
11 Seeking the Death Penalty Against a Party Defendant Who Did  
12 Not Actually Kill the Deceased Aubrey Hawkins. Once again,  
13 your Enmund issue.

14 Having not ruled on this particular  
15 motion before, there are a series of cases. What's the  
16 State's position?

17 MS. SMITH: Your Honor, the State's  
18 position is they're not entitled to notice of what facts we  
19 intend to argue that show the necessary, the requisite  
20 intent. The indictment alleges intent. They've been given  
21 notice that we are proving up the indictment's allegations  
22 and we've done all we're required to do by law.

23 THE COURT: Mr. Tatum, what would you  
24 have the State do they have not done?

25 MR. TATUM: Disclose the difference

1 between this case and the rest of the cases as to what the  
2 State relies upon to prove the additional burden of proof  
3 presented by Enmund of the knowingly human life would be  
4 taken, what the State intends to rely upon as far as either  
5 statements or witnesses in particular, because that's an  
6 element of the burden of proof that the state law doesn't  
7 present, but the Supreme Court has grafted onto this type of  
8 prosecution.

9 THE COURT: Mr. Tatum, you are always  
10 very good at anticipating my questions. But where in the  
11 Code of Criminal Procedure in Texas is the defendant  
12 entitled to this particular request?

13 MR. TATUM: This is a 9-1 (phonetic)  
14 motion, Your Honor --

15 THE COURT: Yes.

16 MR. TATUM: -- in the sense that Texas,  
17 unfortunately, has not addressed this issue adequately.  
18 That's one of the reasons that we claim that the Texas law  
19 is unconstitutional. And having gone forward with that,  
20 your overruling of that position, we feel like that it is  
21 representing somebody who I think all parties agree the  
22 evidence shows is a nonshooter, as the person is  
23 characterized, is entitled to know what the State intends to  
24 meet that burden of proof, if there was anything special for  
25 that evidence for that particular issue. Texas has not

1 dealt with it specifically.

2 THE COURT: Well, as far as requiring the  
3 State to pull either one of the thousand exhibits out and  
4 require them to say this holds this meaning, I think that is  
5 an issue for the jury to decide. Having tried the case now  
6 for the sixth time, I can't imagine there is any surprise  
7 evidence that the State intends to put on Mr. Murphy that we  
8 have not already heard.

9 MR. SHOOK: I think, Judge, it will be  
10 very similar to the other cases and we've turned over all  
11 his background evidence, too, that might be used to the  
12 defense.

13 THE COURT: This issue goes on the front  
14 end, as well as on the conspiracy, as well as the back end  
15 for the Special Issues. So there are so many things that  
16 the Court can't simply order the State to say, okay, this  
17 piece here is what we're going to use. I think that you  
18 have to look at it as a whole. If they are holding back  
19 anything, that's a different matter.

20 MR. TATUM: I guess what we're looking  
21 for is the State has been very generous in providing and  
22 plus having the opportunity of viewing the other prior  
23 trials, the State has provided ample discovery in  
24 generality, especially with the other trials.

25 But this trial being significantly



1 different as a nonshooter, as opposed to the other people  
2 who were characterized as shooters, we're just asking if  
3 there is something else that we have not been made aware of,  
4 other than what has already been presented.

5 THE COURT: I believe the answer was no.  
6 It would be similar in nature. Motion 4 is denied. Motion  
7 5, Determine the Constitutionality of 37.071(2)(b)(2) of  
8 Parties Charge. I have reviewed the motion. Do I hear any  
9 additional issues?

10 MR. TATUM: No, sir.

11 THE COURT: Motion denied. Motion 5-A,  
12 motion to suppress evidence. I anticipate it's the same  
13 issues that I have heard before. I anticipate that the  
14 witnesses from out of state will be required to rule on this  
15 motion. May the Court carry this motion with the evidence?

16 MS. BUSBEE: Yes, Your Honor, we have  
17 agreed to do that.

18 THE COURT: Motion 6, which is your  
19 discovery and production and inspection of evidence. You  
20 have got several subissues here numbered. I will go through  
21 -- I have granted everything 1 through 8. Or do you wish to  
22 tell me what you and the State have agreed upon and I will  
23 jump in where it's specific?

24 MS. BUSBEE: Your Honor, as we went  
25 through this this morning, I believe that the State has

1 given me numbered discovery and it's my belief that they  
2 have complied with this, so that we can be in agreement on  
3 everything except, as I said earlier off the record, No. 40  
4 requests a hearing outside the presence of the jury for  
5 admissibility.

6 I would -- I'm not asking the Court to  
7 grant that at this time. I just ask if I apprise the Court  
8 that I would like to have a hearing, I'm sure he would grant  
9 me one.

10 THE COURT: Yes, ma'am. Let me share  
11 with you some of the issues that I saw when I read this.  
12 The Court has noted that the witness list that I received  
13 from the State was dated August 28, 2003.

14 Does the State have an updated witness  
15 list or have you added anything to the witness list since  
16 then?

17 MR. SHOOK: I told the defense that we  
18 would probably be filing an updated witness list next week.

19 THE COURT: Once again, I'm unable to  
20 tell that because I have an electronic file stamp when I  
21 received the digital document that I printed for the jury  
22 selection. I would appreciate the same format, just  
23 updated, and E-mailed to all the parties and a paper copy  
24 file marked for the court file. So that's an update. We'll  
25 certainly have any hearing upon any issue toward

1 admissibility outside the presence of the jury.

2 Moving on to motion No. 7. Motion for  
3 Evidence Favorable to the Defendant. Any issues that the  
4 State agreed on?

5 MR. SHOOK: We agreed, Judge.

6 MS. BUSBEE: Your Honor, and Mr. Shook  
7 has assured me that he understands this is an ongoing  
8 obligation and if any of this should come to light before  
9 and during the trial, he will bring that to our attention.

10 THE COURT: Motion granted. Motion No.  
11 8, Motion in Limine and for Discovery of Prior Bad Acts and  
12 Extraneous Offenses 404-B and 609 issue.

13 MS. BUSBEE: Your Honor, there's a filing  
14 with the Court dated September 17, where the State gave me  
15 notice, 404-B, and so that's with the Court and we've gotten  
16 that discovery.

17 THE COURT: Granted. General Motion in  
18 Limine No. 9. It looks like you want to limine all the  
19 evidence.

20 MS. BUSBEE: Why not?

21 THE COURT: Can you tell me what your  
22 concern is?

23 MS. BUSBEE: Just I suppose this is what  
24 you might call a prophylactic motion, as far as alerting the  
25 State that we -- the Court has made a ruling that they can't

1 make these comments without having a ruling outside of the  
2 presence of the jury. Because, as you know, it's hard to  
3 unring the bell.

4 THE COURT: No. 4 jumps out at me and  
5 I'll relay this for the benefit of the Court, any comment  
6 the prosecutor knows of other evidence that can't be brought  
7 up before the jury, in the last trial, arguments degraded  
8 into political issues and that the State doing this  
9 grandstanding and then Mr. Shook was allowed to answer that  
10 issue that they knew that they had alleged -- they had  
11 evidence that multiple discharge of weapons and they knew at  
12 that point that they were going to seek a death penalty even  
13 before they were arrested and any statements taken from the  
14 defendants as far as -- it was the defense lobbed it into  
15 the jury box and then I allowed the State to object to that  
16 issue. It was certainly an innuendo and it was, quote,  
17 evidence that was not before the jury, but I allowed the  
18 State to argue that because it was brought by the defense.

19 MS. BUSBEE: I would not have done that.

20 THE COURT: I understand you would not  
21 have done that. But I'm telling you that you can't do that  
22 and then use this limiting issue over the head of the State  
23 because it's not fair.

24 MS. BUSBEE: No, sir. And probably in  
25 that circumstance, you discussed it outside the presence

1 anyway, didn't you?

2 THE COURT: Oh, no. It was right in the  
3 middle of final arguments. They were throwing rocks at each  
4 other, so it was typical for trial. I just ducked and let  
5 them go.

6 MS. BUSBEE: It's argument, Your Honor.  
7 This really has -- if the door is opened, I would have no  
8 complaint. But if the door is not opened, we would ask the  
9 Court to make this motion in limine.

10 THE COURT: Just telling you, I've got  
11 all the doors locked as long as y'all leave it alone.

12 MS. BUSBEE: Fair enough.

13 THE COURT: I'll grant the motion subject  
14 to a hearing. No. 10, Motion in Limine is Guarantee of No  
15 Violence. Mr. Tatum, I have not visited this issue. What  
16 is the parties' positions?

17 MR. TATUM: I think this is a limine, I  
18 think this is from a TDCLA suggested motion that we find  
19 from a defense standpoint defending capital murder cases  
20 around the state that sometimes they call certain expert  
21 witnesses or other people who might testify about certain  
22 issues presented in the motion, that at least there be a  
23 hearing outside the presence of the jury to determine  
24 their ability to testify about those issues.

25 They may not apply so much to Dallas as

1 just to cover our situation.

2 THE COURT: You simply want a hearing?

3 MR. TATUM: Just a hearing.

4 MS. BUSBEE: Your Honor, I don't see that  
5 an order was --

6 THE COURT: There is no order. I'll just  
7 hold that one.

8 MS. BUSBEE: I'll get you an order today.

9 THE COURT: No. 11. Motion in Limine to  
10 Suppress Reputation Evidence. Need a hearing. Granted.  
11 Motion in Limine Regarding Matters Not Within the Personal  
12 Knowledge of a Witness. Obviously you will need to make a  
13 specific objection upon that and we can have a hearing if  
14 necessary.

15 MR. TATUM: Thank you.

16 MS. BUSBEE: So it will be granted upon  
17 my request?

18 THE COURT: Yes. Name calling by the  
19 prosecution which is No. 13. We haven't had any name  
20 calling so far.

21 MS. BUSBEE: Well, except for Mr. Lizard.

22 THE COURT: I believe that was tattooed  
23 on his body.

24 MR. TATUM: Still a name.

25 THE COURT: A man wants to publish it

1 where he published it, then I think it's fair game.

2 MS. BUSBEE: That's why we're talking  
3 about a motion in limine, Your Honor, not prohibition.

4 THE COURT: We had a hearing on it.

5 MR. TATUM: That's all we ask for.

6 THE COURT: Motion in Limine Other  
7 Proceedings.

8 MR. TATUM: Is that granted, Your Honor,  
9 the name calling?

10 THE COURT: Yes. No. 13 was granted.  
11 No. 14 shall be granted. No. 15 is Motion to Request Notice  
12 of Prosecution's Attempt to Certify Copies of Official  
13 Written Instruments. This goes to particular evidence you  
14 are going to focus on or the thousand exhibits? Which one  
15 are you talking about?

16 MS. BUSBEE: As we discussed this  
17 morning, of course I've been given discovery some time ago  
18 and it's my understanding this would be limited to anything  
19 offered which I have already received, which includes the  
20 defendant's prior criminal convictions and juvenile matters.  
21 And I have received copies of that. So it's documented what  
22 I have copies of.

23 But we're asking the Court to order them  
24 at this time officially, if they have anything else that I  
25 haven't received, to give us notice of that.

1 THE COURT: Court orders the State to  
2 produce any evidence that you have not given.

3 MR. SHOOK: We've given it all to them,  
4 Judge.

5 THE COURT: Now, while I'm on point and  
6 thinking about evidence. In trial, concerning this many  
7 exhibits, they will bring out a hundred photographs and they  
8 will want to offer and admit all 100 photographs, but only  
9 use four or five of them. And in the past I've had  
10 Mr. Shook or whoever take all these photographs up to the  
11 witness. They look through them real quick. And then the  
12 defense will say I want to have them tendered to me before  
13 we, you know, allow them to be admitted. And they will sit  
14 there and look at them one by one, talk about them, and then  
15 we all sit there and wait 10 minutes until a particular  
16 lawyer looks at them.

17 MS. BUSBEE: Your Honor, could I speak to  
18 that?

19 THE COURT: Yes, ma'am.

20 MS. BUSBEE: It's always my practice to  
21 say -- so the jury knows I've looked at them, I say, Your  
22 Honor, I've had an opportunity to see these photos, no  
23 objection, as long as there is no objection. And if there  
24 is an objection, I'll let you know. Because the Court gave  
25 me a comprehensive copy of all the exhibits that have been



1 admitted and I've already seen all the pictures. So we have  
2 looked at the pictures. I don't like to do that, either. I  
3 think it aggravates the jury.

4 THE COURT: It does.

5 MS. BUSBEE: But I want them to know that  
6 I care about seeing the pictures. So I let them know I have  
7 seen them.

8 THE COURT: The Court has already ruled  
9 previously on autopsy photographs and had the State remove  
10 from their lists. So if you have any additional specific  
11 objections over the last trial as to a particular  
12 photograph, please bring that to my attention prior to the  
13 jury being in the box.

14 MS. BUSBEE: Yes, sir.

15 THE COURT: That means before we start.

16 MS. BUSBEE: Yes, sir.

17 THE COURT: Okay. Motion to Disclose  
18 Expert Witnesses. I believe both parties have filed that;  
19 is that correct?

20 MR. SHOOK: Yes.

21 MS. BUSBEE: Yes, sir.

22 THE COURT: Prior criminal record, No.  
23 17. Do you -- I assume that you want a hearing on the first  
24 phase of trial that issue should be relevant?

25 MR. TATUM: Yes.

1 MS. BUSBEE: Yes, Your Honor. And  
2 there's a motion coming up that has to do with opening  
3 statement on punishment, having the Court rule prior to the  
4 time that the District Attorney mentions them, if he plans  
5 to, as to whether or not they are admissible before they are  
6 mentioned to the jury. So we'll be coming up on that here  
7 in a minute, too.

8 THE COURT: If I'm going to rule on  
9 admissibility of that type of evidence when they are going  
10 to use it in opening, I need to rule on that pretty quick.

11 MS. BUSBEE: That would be opening as to  
12 punishment.

13 THE COURT: I understand. But I don't  
14 want to be in the middle of this trial and say, here, I want  
15 you to look at these eight files here and tell me what you  
16 think.

17 MS. BUSBEE: Maybe we could discuss this  
18 off the record and come to an agreement on that.

19 THE COURT: That would be fine.

20 MS. BUSBEE: Do you think we could?

21 MR. SHOOK: Sure.

22 MS. BUSBEE: Then we can put it on the  
23 record.

24 THE COURT: I'll hold No. 17. No. 18,  
25 Motion to Require Prosecution to Reveal Any Agreement on

1 Witnesses That Could Influence His Testimony. Does the  
2 State have any agreement with any witnesses?

3 MR. SHOOK: No, sir.

4 MS. BUSBEE: So that's granted and  
5 answered?

6 THE COURT: Granted and answered. No.  
7 19, Motion to Require the State to Reveal Any Agreement  
8 Entered Into by the State and Any Prosecution Witness Which  
9 Could Conceivably Influence Their Testimony.

10 MR. TATUM: Somewhat of a duplication,  
11 Your Honor.

12 THE COURT: Mr. Shook --

13 MR. SHOOK: Don't have any, Judge.

14 THE COURT: -- have you entered into any  
15 agreement that could conceivably influence their testimony?

16 MR. SHOOK: I don't think so.

17 THE COURT: Let me go through this. This  
18 issue has come up. There's a witness from Colorado who  
19 testified at previous trials under a pseudonym and she  
20 received a reward from whomever.

21 MR. SHOOK: Judge, I don't think she's  
22 coming this time.

23 THE COURT: That was the only thing the  
24 Court is aware of. And I got in a trap on testifying under  
25 false names, because I didn't know it was a pseudonym and

1 then I allowed the defense let one of their witnesses  
2 testify under a false name and then he chose not to testify  
3 under a false name, so I'm not going down that road anymore.  
4 The only people that get to testify under a pseudonym as  
5 required by statute is on a sexual assault case. That's out  
6 there, been down that road, and won't do that again.

7 MS. BUSBEE: But they're not coming, so  
8 we won't have an issue with that. Fair enough.

9 THE COURT: No. 20, Motion for Production  
10 of Witnesses' Statements. We have a bunch of them here.  
11 Any issues on 1 through 7?

12 MR. SHOOK: No, sir.

13 THE COURT: Agreed?

14 MR. SHOOK: Yes.

15 MS. BUSBEE: So each is granted, then,  
16 Your Honor? Is that what we're saying?

17 THE COURT: I'm hearing the parties have  
18 agreed, so the motion shall be granted. No. 21, Motion in  
19 Limine with Regard to Matters Concerning the Deceased. I  
20 have not yet heard any reputation or character evidence of  
21 the deceased. Any victim impact testimony is heard after  
22 the trial has been concluded.

23 The only issue that has come up prior is  
24 the videotape that was in the officer's patrol car showing  
25 the last traffic stop he made during the daylight hours and

1 the Court has previously ruled no audio. The ruling was the  
2 State is entitled to show how he appeared in his uniform and  
3 where his -- the issue was which side did he wear his gun on  
4 or how did he have his Sam Brown belt. And it was a very  
5 short 8 or 10 seconds. The video just shows a full figure  
6 and that's it. That's all they have put on.

7 MS. BUSBEE: We wouldn't have any  
8 objection to that. And as long as this victim impact  
9 happens after the verdict --

10 THE COURT: It will happen.

11 MS. BUSBEE: Oh, yes.

12 THE COURT: Granted.

13 MS. BUSBEE: Looking forward to it. I've  
14 been provided with an inventory and I actually at a previous  
15 trial have been able to physically examine the evidence in  
16 this case. So we have been given the opportunity to do that  
17 and what was it, an FBI inventory list? We have that, Your  
18 Honor, so that's been complied with.

19 THE COURT: All right. No. 22 is  
20 granted. No. 23 Motion in Limine on Photographs. I think I  
21 have already covered that one. Granted. But you need to  
22 bring any specific issues to my attention prior to trial.  
23 No. 24, statements made by the defendant need a hearing.  
24 Absolutely.

25 Motion for Discovery of Corroborative

1 Evidence to Accomplish Testimony is motion No. 25. I  
2 haven't seen this one before.

3 MR. SHOOK: We don't plan on having any  
4 accomplices testify, Judge.

5 THE COURT: That answers that question.  
6 Granted.

7 THE COURT: No. 26, Daubert hearing.  
8 Anything in particular you wish to turn the attention to the  
9 Court?

10 MS. BUSBEE: The only thing that I'm  
11 aware of, Your Honor, is that there might be a late-coming  
12 DNA test and I'll let the Court know if we want a hearing on  
13 that. We haven't gotten the results on that yet.

14 MR. SHOOK: You won't want a Daubert  
15 hearing on the medical examiner, will you?

16 MS. BUSBEE: No, I can't imagine why.

17 THE COURT: So you don't anticipate  
18 anything at this point?

19 MS. BUSBEE: No, Your Honor. If I would  
20 like to urge this, I will urge it at the time. If we could  
21 hold it or whatever the Court pleases.

22 THE COURT: No. 27, 404(b). I think that  
23 you have already indicated the State has filed that notice  
24 with the Court.

25 MS. BUSBEE: Yes.

1 THE COURT: Granted. No. 28, Written  
2 Objection to Admissibility of Extraneous Offenses, Request  
3 for Procedural Determination by the Trial Court for any  
4 Finding of Facts and Conclusions of Law for a Limiting  
5 Instruction.

6 There are so many offenses here, you need  
7 to be -- can you point me to what you are concerned with?

8 MR. TATUM: Basically, is this a  
9 continuation of the other motions dealing with extraneous  
10 that there be -- the jury be instructed as far as the  
11 limiting effect on whatever the issue is, if there are  
12 extraneous offenses that come into play, if they are  
13 submitted for evidentiary purposes.

14 THE COURT: I have read Mr. Murphy's  
15 statement months ago. Does his statement include other  
16 offenses prior --

17 MR. SHOOK: I don't believe it does.

18 THE COURT: -- prior to Oshman's?

19 MR. SHOOK: I believe his statement does  
20 not -- it talks about Radio Shack, but didn't mention the  
21 robbery. It just says we got these things from Radio Shack,  
22 which doesn't say it's a robbery. And he mentions prison  
23 once, but that's come in in the other trials, but he doesn't  
24 mention, you know, any violence during the escape or  
25 anything like that.

1 But we read it again this morning. I  
2 don't think it's mentioned any other crimes.

3 THE COURT: I've made previous rulings  
4 where on the written statements I have redacted extraneous  
5 offenses that the State has not shown or proved up in their  
6 case in chief. The last trial, the defense wanted all that  
7 stuff in. So it's gone both ways. So you need to raise the  
8 flag on a particular piece of evidence that you are  
9 concerned with and I can make a particular ruling.

10 MS. BUSBEE: You know, I would just as  
11 soon redact references to Radio Shack.

12 THE COURT: I need to see --

13 MR. SHOOK: It just says -- you can look  
14 at the statement. It doesn't mention any robbery or  
15 anything. It says --

16 MS. SMITH: "I had a little small Radio  
17 Shack, two way. And I also had a Radio Shack radio scanner.  
18 We had bought a book."

19 MR. SHOOK: "We bought a book and it came  
20 from Radio Shack."

21 MS. BUSBEE: So that does seem pretty  
22 benign.

23 THE COURT: Because they have the actual  
24 radio, so it's not like the jury is not going to see it.

25 MS. BUSBEE: Okay. I guess not. We



1 won't request that that be redacted.

2 MR. SHOOK: I'm sure Ms. Busbee can look  
3 over it in between time and we'll get together again next  
4 week and see if she's seen anything that --

5 MS. BUSBEE: Your Honor, there is one  
6 thing that we're going to request be redacted out of that  
7 statement and that's the -- I think that's the last sentence  
8 or couple of sentences having to do with the defendant  
9 having an AR-15 weapon, because it's subsequent to the  
10 commission of this crime and it's subsequent to the events  
11 concerning the conspiracy. And we would submit that that's  
12 an extraneous that we would not like the jury to hear about  
13 on guilt or innocence.

14 MR. SHOOK: That, Judge, obviously we  
15 oppose that. That -- those statements all have to do with  
16 them getting away from the scene of the crime and clearly  
17 goes to his intent, especially when he says he wants to  
18 initiate a firefight.

19 MS. BUSBEE: It's our position that you  
20 can't -- that this was subsequent to the offense and  
21 therefore extraneous. The offense -- the offense was  
22 completed.

23 THE COURT: Mr. Shook was about to say  
24 evidence of flight from the scene of the crime is  
25 admissible, which it is. Is that correct, Mr. Shook?

1 MR. SHOOK: Yes, sir.

2 THE COURT: And I'm trying to pull the  
3 document -- that was a Defense Exhibit, wasn't it?

4 MR. SHOOK: I don't know if this one.

5 MS. BUSBEE: The last trial Bubba read it  
6 to the jury. Dramatically, I might add.

7 THE COURT: Ms. Busbee, you are objecting  
8 to this sentence, quote, "I got out" --

9 MS. BUSBEE: Yes.

10 THE COURT: "I got into the rear seat  
11 behind the driver of the same truck. Period. My purpose  
12 was to -- was to if pursued by the police I was to initiate  
13 firefight with the AR-15."

14 MS. BUSBEE: Right. That -- let me  
15 clarify my argument on this. The defendant is indicted  
16 under two theories, one aggravated murder in the course of a  
17 robbery, and the other, murder of a police officer. Murder  
18 of the police officer had been concluded. And so what  
19 happened subsequent to that is extraneous.

20 Now, if they're going under the theory of  
21 a robbery and they are going to argue that it's admissible  
22 because it's evidence of fleeing, it's not evidence of  
23 fleeing. It's evidence of state of mind. And we object to  
24 its inclusion in front of the jury.

25 THE COURT: Well, he talks about having

1 other weapons and he had .357s and whether it was an AR-15  
2 or .357 or if it was before the motel or during, it's all  
3 felons in possession of firearms. I mean, I can't separate  
4 out one firearm and not the others. It's all -- it's all in  
5 the same contextual evidence as a result of the commission  
6 of a felony offense and flight therefrom. I understand your  
7 objection.

8 MS. BUSBEE: Thank you for reminding me.  
9 Let me also add the felon in possession of a firearm as an  
10 extraneous that we would object to inclusion of the evidence  
11 of guilt or innocence and ask that it be redacted from the  
12 confession.

13 THE COURT: I understand your issues and  
14 I'm going to deny those motions.

15 MR. TATUM: Thank you, Your Honor.

16 THE COURT: I assume we're going to have  
17 a detective on the admissibility from the State in a few  
18 minutes?

19 MR. SHOOK: Yes, I would have Detective  
20 Johnson.

21 THE COURT: No. 29.

22 MR. TATUM: If the defendant were to take  
23 the stand that there be a ruling as to what impeachment  
24 evidence would be allowed.

25 THE COURT: You are asking me to make a

1 precipitatory ruling?

2 MR. TATUM: Yes.

3 THE COURT: Denied. I would have a  
4 ruling after the relevant hearing.

5 MR. TATUM: Thank you, Your Honor.

6 THE COURT: Motion to Define Beyond a  
7 Reasonable Doubt. You wish for me to overrule Judge Price  
8 on the Court of Criminal Appeals on whether or not we should  
9 have a definition or not?

10 MR. TATUM: Right.

11 THE COURT: I don't think I want to go  
12 there.

13 MR. TATUM: They created it one time.  
14 They may create one in the future.

15 THE COURT: Denied.

16 MR. TATUM: Thank you.

17 THE COURT: Motion No. 31 to hold  
18 unconstitutional 37.071, Section 2(e) and (f), Failure to  
19 Require Mitigation Be Considered. This is a different twist  
20 on the first two I ruled upon. What is the different twist  
21 here?

22 MR. TATUM: The failure to require the  
23 mitigation be considered.

24 THE COURT: Motion denied. No. 32,  
25 Defendant's Motion in Limine Regarding Improper Burden

1 Shifting Through Misconstruing the Concept of Reasonable  
2 Doubt.

3 MS. BUSBEE: This is one of those TDCLA  
4 motions. As you can see, it's quite long and involved in  
5 which I think the motion pretty much speaks for itself in  
6 argument.

7 THE COURT: I see a Keith Hampton motion  
8 here. Motion denied. Mr. Shook, don't misconstrue the  
9 concept of reasonable doubt and don't shift the burden to  
10 the defense.

11 MR. SHOOK: Yes, Your Honor.

12 THE COURT: Motion No. 33, to Pretrial  
13 Evidentiary Rulings to Determine Admissibility of Extraneous  
14 Offenses. Anything that we have not yet discussed?

15 MS. BUSBEE: This is what we talked about  
16 earlier, Your Honor, having to do with -- maybe not, but  
17 since we do know what these extraneous offenses are, we're  
18 going to have a discussion with the Court about any  
19 objections that we might have. And if it becomes necessary  
20 to put it on the record, we will do it prior to trial in a  
21 timely fashion.

22 THE COURT: Granted. No. 34, Motion to  
23 Test the Qualification of Prosecution Character and  
24 Reputation Witnesses. I assume this would be in the second  
25 phase of the trial?

1 MR. TATUM: Yes.

2 THE COURT: Having no crystal ball here,  
3 do you anticipate any issues, Mr. Shook?

4 MR. SHOOK: No, sir.

5 THE COURT: Granted. Motion in Limine  
6 with Regard to Tattoos. Do you have any tattoos, Mr.  
7 Murphy?

8 MR. SHOOK: I don't believe we will  
9 introduce that type of evidence, Judge.

10 MS. BUSBEE: That's just in case, like  
11 jurors getting arrested and maybe somebody got a tattoo. I  
12 wasn't aware of any tattoos, but I haven't done my own  
13 personal discovery. So --

14 THE COURT: Granted. Motion in Limine  
15 Character of Complainant Victim Impact. I think that I have  
16 already ruled on that. That would be after the trial.  
17 Granted.

18 MS. BUSBEE: I don't guess that we need  
19 to reach No. 37, if that's going to be done after the  
20 verdict.

21 THE COURT: Yes. There is a very  
22 specific procedure that if there is a victim impact  
23 statement filed with the Court, after a verdict I'll allow  
24 you to inspect it before the witness has an opportunity to  
25 testify. Motion granted. I think you will find a copy of

1 the same one six times.

2 Motion in Limine on Punishment Argument.

3 This is a boiler plate motion. What is your specific issue?

4 MR. TATUM: One of those TDCLA motions,  
5 Your Honor, cover situations to cover the defense  
6 anticipating certain prejudicial argument or potential for  
7 prejudicial argument.

8 THE COURT: Motion denied. No. 39,  
9 Motion to Exclude Evidence of Unadjudicated Offenses During  
10 the Punishment Phase. He's filed notice. Is there any  
11 particular issue that you have other than the notice he's  
12 filed?

13 MR. TATUM: No. I just preserve the  
14 position of -- defensive position that these are  
15 unconstitutional, the mention of other unadjudicated  
16 offenses in general, contrary to the Texas Statute that  
17 allows them.

18 THE COURT: Denied. No. 40, Defendant's  
19 Request for Notice of State's Intention to Introduce  
20 Evidence of Other Crimes, 37.07. We've already visited this  
21 one how many times?

22 MS. BUSBEE: Three times.

23 THE COURT: Three times. Granted.

24 MS. BUSBEE: At this time we don't know  
25 that there will be additional motions. They do seem

1 exhaustive, except having to do with the charge of the  
2 Court. We've been given a charge of the Court. Of course,  
3 we haven't heard all the evidence. There may be additional  
4 motions having to do with requested charges. We ask -- the  
5 Court has provided the defense with the record in the five  
6 previous cases. We ask the Court, I'm not aware of, but we  
7 tried to be as thorough as we could, if there were any  
8 motions filed by the previous defendants and their counsel  
9 that we have not covered here today, we would ask the Court  
10 to consider those filed by the defense and argued by the  
11 defense as they were done in previous trials and to consider  
12 those as part of the record in Mr. Murphy's trial as well.

13 THE COURT: I'm glad you brought that up.  
14 The Court did provide a copy of the charge to all the  
15 parties several weeks ago upon your request. I'm surprised  
16 that I've heard nothing from anyone. I wonder if you have  
17 looked at it.

18 Mr. Sanchez, have you researched the  
19 charges that I provided for you?

20 MR. SANCHEZ: Not yet, Your Honor.

21 THE COURT: I know Mr. Shook has not, but  
22 Ms. Smith has.

23 MR. SHOOK: Ms. Smith has and discussed  
24 it with me.

25 THE COURT: That's why she's here. Once



1 again, the reason I provided it is I worked several days on  
2 modifying the charge to what I anticipate the evidence will  
3 show in this case. What I would like to have is y'all look  
4 at it.

5 MS. BUSBEE: I just gave it to Mr. Tatum.  
6 He had an E-mail failure, too. We need to work that system  
7 out. But in any event, I gave it to him --

8 MR. TATUM: I have it now.

9 MS. BUSBEE: He has it now and we've done  
10 this and he's going to direct all his attention to that.

11 THE COURT: Because what I don't want to  
12 happen is standard deal, you know, we're ready for the jury  
13 to come in and then come in at the last minute and I want  
14 you to change these 8 pages --

15 MS. BUSBEE: No, sir.

16 THE COURT: -- and I will not be a happy  
17 camper, if that were to occur. Yes, ma'am.

18 MS. SMITH: Did you request that all of  
19 the previously filed motions in all the other trials be  
20 incorporated into this? Did I misunderstand that?

21 MS. BUSBEE: No.

22 MS. SMITH: I believe in Halprin you  
23 actually directed defense counsel to actually make copies of  
24 all those and file them.

25 THE COURT: I haven't gotten to that

1 point. But for the recordkeeping in this case, anything  
2 that you want considered in this trial must be marked as an  
3 exhibit or file marked under this heading because you have  
4 to understand the huge task. The Court Reporter must -- any  
5 evidence that you want me to consider on a previous ruling,  
6 anything that you want me to consider, I've got to have  
7 specifically offered in this case.

8 MS. BUSBEE: I understand that, Judge.

9 THE COURT: Take notice of.

10 MS. BUSBEE: You told me that you had  
11 provided that to Mr. Tatum. I wanted to put it in the  
12 record we have that and that would be included in the record  
13 of this case.

14 THE COURT: I'm telling you, if you want  
15 it included, you have got to bring it in, you have got to  
16 have it marked, and you have got to have it in this record.  
17 Because we're not going to go back and say refer to volume  
18 38 of trial No. 2. It won't work.

19 MS. BUSBEE: We understand that. We have  
20 that and we will have that in the record. We just wanted to  
21 get it on this record that we're -- we're making the State  
22 aware that we're doing that because we had told the Court  
23 that we were doing that.

24 THE COURT: Very well. So are we ready  
25 for some testimony? Do you need a break?

1 MR. SHOOK: No, I'm ready.

2 (Recess)

3 THE COURT: Ready?

4 RANDALL JOHNSON,

5 having been duly sworn, was examined and testified as  
6 follows:

7 DIRECT EXAMINATION

8 BY MR. SHOOK:

9 Q. Would you tell us your name, please.

10 A. Randall Johnson.

11 Q. And how are you employed, sir?

12 A. By the City of Irving Police Department.

13 Q. And what are your duties with them?

14 A. I'm a detective in the Crimes Against Persons  
15 Section.

16 Q. Let me ask you if you were one of the lead  
17 detectives assigned to the capital murder that occurred at  
18 the Oshman's involving Officer Aubrey Hawkins as a victim on  
19 December 24 of 2000?

20 A. Yes, sir.

21 Q. Subsequent to that event, did you and some  
22 other officers travel to the State of Colorado after some of  
23 the suspects were located in that state in January of 2001?

24 A. Yes, sir.

25 Q. Do you recall -- I think you arrived there on

1 January 22nd of 2001?

2 A. Yes, sir.

3 Q. Okay. Let me turn your attention to the next  
4 day on January 23rd, in the evening hours, and ask if you  
5 were notified that suspects Patrick Murphy and Donald  
6 Newbury had been found in the city of Colorado Springs?

7 A. Yes, sir.

8 Q. What location were they at when you were  
9 notified?

10 A. At the Holiday Inn.

11 Q. Was there a standoff situation at that time?

12 A. They were in a room and were not coming out.

13 Q. Did you and Detective Spivey go to the  
14 location at that time?

15 A. Yes, sir.

16 Q. Sometime later in the early morning hours of  
17 the 24th of January, did Colorado Springs -- did Mr. Murphy  
18 and Mr. Newbury surrender to the Colorado Springs police  
19 officers?

20 A. Yes, sir.

21 Q. Once Mr. Murphy surrendered to the police,  
22 where was he taken at that time?

23 A. To the Colorado Springs Police Department.

24 Q. And did you also go to the Colorado Springs  
25 Police Department at that time?

1 A. Yes, sir.

2 Q. What time approximately did you arrive there?

3 A. Around 4:00 in the morning.

4 Q. Okay. Once you arrived at the Colorado  
5 Springs Police Department, did you get a chance to meet with  
6 Mr. Murphy?

7 A. Yes, sir, I did.

8 Q. Do you see Mr. Murphy in the courtroom today?

9 A. Yes, sir, I do.

10 Q. Would you point him out to the Judge, please?

11 A. He's sitting at the defense table with the red  
12 and black tie on.

13 Q. And that's the man that you knew as Patrick  
14 Henry Murphy?

15 A. Yes, sir.

16 MR. SHOOK: Your Honor, if the record  
17 could reflect that the witness has identified the defendant.

18 Q. (By Mr. Shook) What -- where was it that you  
19 first met Mr. Murphy down at the Colorado Springs Police  
20 Department?

21 A. In their interview room.

22 Q. Who was present at that time?

23 A. Myself and Lt. Paris.

24 Q. Was he also with the Irving Police Department?

25 A. Yes, sir.

1 Q. And how were you dressed?

2 A. In a suit.

3 Q. Did you have any weapons on you?

4 A. No, sir.

5 Q. Okay. And did Lt. Paris have his weapons on  
6 him?

7 A. Not that I'm aware of, no, sir.

8 Q. Did you introduce yourself and identify  
9 yourself to Mr. Murphy?

10 A. Yes, sir.

11 Q. At that point in time did you read him his  
12 Miranda rights?

13 A. I advised him of his Miranda rights.

14 Q. Could you read them into the record or tell --  
15 inform the Court of the Miranda rights you advised him of at  
16 that time, just as you did on that occasion?

17 A. Yes, sir. I told the defendant Murphy that  
18 you have the right to remain silent and not make any  
19 statement at all. Any statement that you make may and  
20 probably will be used as evidence against you in your trial.  
21 You have the right to have an attorney present to advise you  
22 prior to or during any questioning. If you cannot afford an  
23 attorney, an attorney will be appointed to counsel with you.  
24 And you have the right to terminate this interview at any  
25 time.

1 Q. Did Mr. Murphy indicate that he understood his  
2 rights?

3 A. Yes, sir.

4 Q. And did he agree to waive his rights and speak  
5 to you?

6 A. Yes, sir.

7 Q. At approximately what time was it that he  
8 began to -- you began to interview Mr. Murphy?

9 A. Between 4:16 and 4:21 a.m.

10 Q. A.M.?

11 A. Yes, sir.

12 Q. And as you began to talk with Mr. Murphy, did  
13 you ask him if he would give you a written statement?

14 A. Yes, sir.

15 Q. And did that happen early on in the process?

16 A. Yes, sir.

17 Q. Did you discuss with him how the statement  
18 would be taken, the procedure that you would use?

19 A. Yes, sir.

20 Q. And what procedure was decided upon?

21 A. It was decided that I would write the  
22 statement.

23 Q. Okay. And did you have a voluntary statement  
24 form there with you?

25 A. Yes, sir.

1 Q. And as he -- he more or less dictated the  
2 statement to you?

3 A. Yes, sir.

4 Q. Okay. And how did that occur? Would he talk  
5 for a minute and you write it down?

6 A. Right. And then I would have to stop him and  
7 let me catch up and I would say, okay, what then? And we  
8 continued on from there.

9 Q. Now, at any time did he ever ask for any  
10 refreshments, anything like that?

11 A. I think we offered him and he wanted a Dr.  
12 Pepper and that was given to him.

13 Q. Okay. At any time during the interview, did  
14 he ever ask to take a restroom break?

15 A. He wanted to go to the restroom twice and that  
16 was also done.

17 Q. Okay. After the statement was taken from him,  
18 you finished -- he finished dictating the statement to you,  
19 what did you do then?

20 A. I then asked him to read the whole statement  
21 from the top and bottom, all nine pages, and see if there  
22 was anything that we needed to add, change, or take out.

23 Q. And did he do that?

24 A. He did.

25 Q. Okay. In fact, in parts of the statement



1 there were some deletions or scratched out portions; is that  
2 right?

3 A. Yes, sir.

4 Q. When that would occur, what would you have him  
5 do?

6 A. Initial those portions.

7 Q. Okay. After he had completely read the  
8 statement and didn't want to make any more changes or  
9 deletions, what did you do then?

10 A. Then I had him sign the statement in front of  
11 a witness, civilian witness.

12 Q. Did he sign the statement freely and  
13 voluntarily?

14 A. Yes, sir.

15 Q. Did you ever threaten or try to coerce him in  
16 any way or force him to sign the statement?

17 A. No, sir.

18 Q. Did you ever promise him any benefit, reward,  
19 probation, parole, any type of benefit at all, to induce him  
20 to sign the statement?

21 A. No, sir.

22 Q. Did you have him sign each page of the  
23 statement?

24 A. Yes, sir.

25 Q. Where did you have him sign that?

1           A.       On each page he signed right under the portion  
2 that I wrote out and then also at the bottom right of each  
3 page.

4           Q.       Let me show you what has been marked as State  
5 Exhibit 978. Is this the original statement?

6           A.       Yes, sir.

7           Q.       And it consists of nine pages; is that right?

8           A.       That's correct.

9           Q.       His signature is at the bottom of each page  
10 where there is an area marked for a signature and also at  
11 the bottom under the written portion; is that correct?

12          A.       That's correct.

13          Q.       And what is the portion of writing -- having  
14 him sign his name at the bottom of each of the written  
15 portions?

16          A.       So I cannot add anything else without his  
17 knowledge.

18                   MR. SHOOK: Your Honor, at this time we  
19 will offer State Exhibit 978 for purposes of this hearing.

20                   MS. BUSBEE: No objection for purposes of  
21 this hearing, Your Honor.

22                   MR. SHOOK: We'll pass the witness.

23                   THE COURT: State 978 shall be admitted  
24 for purposes of this hearing.

25                   CROSS-EXAMINATION

1 BY MS. BUSBEE:

2 Q. Detective Johnson, did you take statements  
3 from any of the other codefendants in this case?

4 A. Yes, ma'am.

5 Q. All of them or some of them?

6 A. Some.

7 Q. Okay. Whose statements -- what other people's  
8 statements did you take?

9 A. Michael Rodriguez.

10 Q. And you had done that the day before?

11 A. Yes, ma'am.

12 Q. Okay. And this -- you said you were with  
13 Detective Spivey, but he was not the one that went in the  
14 interview room with you. It was Detective Paris or Officer  
15 Paris?

16 A. He was a lieutenant at the time, Lt. Paris.

17 Q. Lt. Paris, and he's with the Irving Police  
18 Department?

19 A. Yes, ma'am.

20 Q. So were you and Paris and Murphy were the only  
21 people in this interview room?

22 A. Yes, ma'am.

23 Q. Was the civilian witness brought in subsequent  
24 to witness the signature?

25 A. Before he signed the statement, yes, ma'am.

1 Q. But not during the time that the statement was  
2 taken?

3 A. No, ma'am.

4 Q. When you arrived at the Colorado Springs, is  
5 that a detention facility? Is that what they call it?

6 A. It's their police department.

7 Q. Police department? Did you -- was your  
8 arrival simultaneous with Mr. Murphy? Did you get there  
9 before? Did you follow them? I wasn't clear from your  
10 testimony as to whether or not you had been at the scene  
11 when they were taken from the hotel room or whether you just  
12 met them at the police department.

13 A. I met them at the police department.

14 Q. Okay. Were you there prior to the time that  
15 they arrived or how did that work out?

16 A. I don't recall if it was -- they left before I  
17 left the hotel and I don't recall if I got there right after  
18 they arrived or at what portion that occurred at.

19 Q. Whose custody was he in before he was in your  
20 custody?

21 A. Colorado Springs Police Department.

22 Q. Do you remember what officer?

23 A. No, ma'am.

24 Q. And these were uniformed officers?

25 A. Yes, ma'am.

1 Q. Were you present for the -- what for lack of a  
2 better expression, would be the standoff prior to the time  
3 that the two escapees surrendered? Were you present for  
4 that?

5 A. During portions of it, yes, ma'am.

6 Q. Are you aware of what time that began?

7 A. No, ma'am.

8 Q. Were you made aware later on what time that  
9 began?

10 A. I'm sure I was, but I don't recall up here  
11 what time.

12 Q. Do you remember approximately what time you  
13 arrived at the scene?

14 A. Close to midnight.

15 Q. Okay. And approximately what time was the  
16 surrender?

17 A. A little after 3:00, before 4:00.

18 Q. All right. Could you describe the scene for  
19 the Court outside this hotel or motel?

20 A. There were portions of the hotel were secured  
21 with crime scene tape. A lot of officers, a lot of news  
22 civilians. Portions of the hotel had been evacuated.

23 Q. Were there special lighting brought in for --  
24 to illuminate the scene?

25 A. I don't recall that.

1 Q. What sort of weapons were in evidence brought  
2 there by the various law enforcement agencies?

3 A. I'm not sure.

4 Q. Did you see weapons?

5 A. Yes, ma'am.

6 Q. Did you see sharpshooters and people with  
7 rifles?

8 A. No, ma'am.

9 Q. How many uniformed officers did you see at the  
10 scene? Not an exact, just the best that you can recall.

11 A. Uniformed, I would say five or ten. I just  
12 stayed within one portion of the hotel.

13 Q. All right. And when you say one -- was this a  
14 hotel with an exterior door that the door of the room went  
15 to the great outdoors or there were interior halls?

16 A. Interior hall.

17 Q. All right. So how were -- was law enforcement  
18 communicating with the people in the room, the defendant and  
19 Mr. Newbury?

20 A. I believe through the telephone.

21 Q. All right. And at some point there was some  
22 kind of a conversation with the media. Was that done over  
23 the telephone?

24 A. Yes, ma'am.

25 Q. Would the people in the room be able to see,

1 either through the peephole or a window in the room, what  
2 was outside of that room? Was there a window or patio door  
3 to allow them to see what was outside that room as far as  
4 law enforcement presence?

5 A. I'm not sure what they could see from their  
6 position.

7 Q. Okay. Where were you physically located? In  
8 the hallway or outside of the hotel?

9 A. In the hallway sometimes and also in another  
10 banquet room.

11 Q. Okay. How many police, marked police vehicles  
12 were at the hotel?

13 A. I don't have a number on that.

14 Q. Were there more than five?

15 A. I don't recall seeing that many.

16 Q. What about plainclothes officers, how many  
17 plainclothes officers were there at the hotel?

18 A. I probably saw about 15 to 20.

19 Q. Okay. And were you aware of the fact that  
20 they were officers because they displayed a badge on their  
21 clothing?

22 A. Yes, ma'am.

23 Q. And was there a SWAT Team present at the  
24 hotel?

25 A. Yes, ma'am.

1 Q. All right. Could you describe that for us,  
2 please?

3 A. I didn't see them.

4 Q. Where were they located?

5 A. I don't know.

6 Q. Was there a SWAT Team vehicle, some law  
7 enforcement have, you know, an armored kind of van. Was  
8 that present?

9 A. I don't know if it was or not, no, ma'am.

10 Q. Was there anything, other communication, other  
11 than through the telephone that you are aware of like  
12 bullhorns or anything like that?

13 A. I did not hear a bullhorn.

14 Q. All right. All right. Now, so where were you  
15 when you were apprized that these individuals had been  
16 found?

17 A. In my hotel room across the street.

18 Q. Now, were you already staying in that hotel  
19 when you had -- when the other escapees had been caught the  
20 day before or had you moved to Colorado Springs because of  
21 intelligence that made you think that these other people  
22 would be in Colorado Springs?

23 A. No. That was the only hotel that we stayed  
24 in.

25 Q. So what time were you made aware that they had



1 been located?

2 A. Before midnight.

3 Q. But you don't remember what time?

4 A. No, ma'am.

5 Q. Okay. So you go to the Colorado Police  
6 Department at the same time, I guess, that the escapees were  
7 transported there --

8 THE COURT: Colorado Springs?

9 Q. (By Ms. Busbee) Colorado Springs. Of course  
10 that's what I mean. The Colorado Springs Police Department  
11 more or less contemporaneously at the time that the escapees  
12 were taken into custody; is that correct?

13 A. I would say around the same time, yes, ma'am.

14 Q. All right. And were you aware where they were  
15 taken when they were brought into the building?

16 A. To the interview room.

17 Q. All right. Were you aware as to whether or  
18 not there was a magistrate on duty at that time in Colorado  
19 Springs?

20 A. I'm not aware of that, no, ma'am.

21 Q. All right. Did you inquire as to whether a  
22 magistrate was available?

23 A. No, ma'am.

24 Q. And when you were taken in this interview room  
25 -- I take it some other officers went to talk to

1 Mr. Newbury?

2 A. That's correct.

3 Q. What officers were those?

4 A. Sergeant Spivey and Investigator Burkett.

5 Q. When you get to that location and you go into  
6 the interview room, could you describe Mr. Murphy's  
7 condition as far as whether or not he was handcuffed or  
8 shackled or if you recall?

9 A. I know he was handcuffed and I don't recall if  
10 he was shackled or not.

11 Q. And what was he wearing?

12 A. I don't recall.

13 Q. What was the weather like that day? Was it  
14 cold? I know it was in January.

15 A. To me it was cold.

16 Q. Did he have on a jacket?

17 A. I don't recall.

18 Q. Do you recall that he was not wearing a shirt?

19 A. I don't believe he had a shirt on, no, ma'am.

20 Q. So about how long is it or ride is it from the  
21 hotel to the Colorado Springs Police Department?

22 A. I don't know.

23 Q. Was it an hour or 10 minutes?

24 A. It did not seem a long period of time, no,  
25 ma'am.

1 Q. Okay. Now, when you entered the room with Mr.  
2 Murphy, did you have any recording device?

3 A. No, ma'am.

4 Q. Did you take any tape recordings?

5 A. No, ma'am.

6 Q. Did you take any notes other than those that  
7 you provided to the District Attorney? And I'm not aware of  
8 any notes having to do with your interview with him other  
9 than this confession. Were there any notes that you had  
10 made about taking his confession that are not contained in  
11 the confession?

12 A. If there were notes, it's been supplied to the  
13 DA's Office.

14 Q. Do you recall whether you made any notes?

15 A. No, ma'am, I don't recall.

16 Q. And what about Detective Paris -- or Lt.  
17 Paris, did he make any notes?

18 A. Not that I'm aware of.

19 Q. Now, is there videotaping equipment available  
20 in this police department in these interview rooms?

21 A. I believe so, yes, ma'am.

22 Q. Did you utilize that?

23 A. No, ma'am.

24 Q. So there was no electronic recording of any  
25 kind of any of the events surrounding his confession?

1 A. That's correct.

2 Q. Now, what was the condition of the defendant  
3 as far as what his emotional state appeared to you?

4 A. Seemed fine to me and didn't have any problems  
5 conversing with me or answering my questions or carrying on  
6 a conversation.

7 Q. Did you -- was he crying or upset?

8 A. No, ma'am.

9 Q. Was he -- did you notice that he was  
10 shivering?

11 A. No, ma'am.

12 Q. Did you ever give him a shirt or did anybody  
13 ever provide him with any shirt or clothing to wear for this  
14 interview?

15 A. I don't recall if that was done.

16 Q. So -- now, what was the reason that you wrote  
17 the statement as it was dictated to you instead of having  
18 the defendant write out? I think some of the other people  
19 wrote out their own statement. What was the reason that it  
20 was done this way in this case?

21 A. It was the defendant's choice.

22 Q. And did he state why he wanted you to write it  
23 down?

24 A. No, ma'am.

25 Q. How long did it take for him to dictate this

1 statement to you?

2 A. Roughly around two and a half hours.

3 Q. Okay. Did you write it down as he said it?  
4 It's nine pages. Why did it take so long? What took so  
5 long to --

6 A. Just, it's nine pages and it just takes a  
7 while to handwrite someone's statement as they talk.

8 Q. Okay. And did Mr. Murphy have on his glasses?

9 A. I don't recall at this point. I believe he  
10 did, but I don't remember.

11 Q. Was there ever anyone else present during this  
12 two-and-a-half-hour period of time that came into the room  
13 during that period of time say, for instance, to bring a Dr.  
14 Pepper or for any other purpose that you remember?

15 A. A Dr. Pepper was brought, but no one else came  
16 in. They left us alone.

17 Q. Okay. Now, were you aware that the defendant  
18 had been awake for 20, 20 hours about 4:00 in the morning?  
19 Were you aware of the fact that he hadn't had sleep for --

20 A. No, ma'am.

21 Q. Did you question him about that?

22 A. No, ma'am.

23 Q. Did you make any inquiries as to whether or  
24 not a magistrate was on duty at that time?

25 A. No, ma'am, I did not.

1 Q. All right. And having, you know, been through  
2 a procedure similar to this in the other, I think it was  
3 Teller County where these other inmates were arrested, were  
4 you familiar with the procedures in Colorado for taking a  
5 defendant before a magistrate?

6 A. I know they were taken before a magistrate at  
7 some time.

8 Q. But that was subsequent to taking their  
9 statements?

10 A. That's correct.

11 Q. And what was your understanding of the  
12 procedure in Colorado for taking someone before a  
13 magistrate?

14 MR. SHOOK: We'll object to relevance,  
15 Judge.

16 THE COURT: Sustained.

17 Q. (By Ms. Busbee) Well, I guess my question is,  
18 were you aware that a magistrate was available?

19 A. No, ma'am, I was not.

20 Q. Now, at some point during your interview of  
21 the defendant were you apprized of the fact that there was  
22 someone, an attorney, who wanted to speak with him?

23 A. No, ma'am.

24 MS. BUSBEE: I'll pass the witness, Your  
25 Honor.

1 THE COURT: Any redirect?

2 REDIRECT EXAMINATION

3 BY MR. SHOOK:

4 Q. Let me ask you this. When you interviewed Mr.  
5 Murphy, how long had you been up?

6 A. Since 6:00 on the 22nd, so, 48 something  
7 hours, something like that.

8 Q. All right.

9 MR. SHOOK: That's all we have.

10 MS. BUSBEE: I have no recross, Your  
11 Honor.

12 THE COURT: Thank you, Detective. You  
13 may be excused.

14 MR. SHOOK: That's all we have, Judge.

15 MS. BUSBEE: Call the defendant for the  
16 limited purpose of this hearing.

17 PATRICK MURPHY,

18 having been duly sworn, was examined and testified as  
19 follows:

20 DIRECT EXAMINATION

21 BY MS. BUSBEE:

22 Q. Please state your name for the record.

23 A. Patrick Henry Murphy, Jr.

24 Q. And are you the same person who is on --  
25 indicted in Cause No. F01-00328?

1 A. Yes, ma'am.

2 Q. And Mr. Murphy, it's your statement that's the  
3 subject of this Motion to Suppress Statement that you have  
4 testified about, I believe it's No. 978 for record purposes,  
5 and you are familiar with that statement?

6 A. Yes, ma'am.

7 Q. I want to ask you some questions about the  
8 circumstances surrounding your giving that statement. At  
9 the time that you were taken into custody, you had been  
10 awake for how many hours?

11 A. At the time I was taken into custody, I think  
12 I had been awake for about approximately 20 hours.

13 Q. Okay. And when was the last time that you had  
14 taken any food or had anything to eat? How many hours --  
15 let me make that easier. How many hours had it been since  
16 you had eaten?

17 A. Approximately 16 hours. We had at one point  
18 we had had breakfast from the room service, so that was the  
19 last time we had eaten, at breakfast.

20 Q. Was that 10:00 in the morning or 6:00 in the  
21 morning? Do you recall?

22 A. I would say it was before 9:00 because the  
23 hotel doesn't -- the room service doesn't bring breakfast  
24 around after 9:00, I think. I'm not sure.

25 Q. Now, what time was it when you were made aware



1 that the police were there to arrest you? Do you recall?

2 A. I believe the first contact we had was in the  
3 early evening. I couldn't say definite what time it was,  
4 but I believe it was in early evening.

5 Q. So when you say early evening, are you saying  
6 near or about 6:00, 7:00? What's your definition of that?

7 A. About 6:00 or 7:00, probably before 8:00.

8 Q. And how were you made aware of that?

9 A. There was a knock on the door and Mr. Newbury  
10 went to look out the peephole and when he looked out the  
11 peephole, he couldn't see anything. It was totally blocked  
12 off. And he told me that he couldn't see and I walked over  
13 there and looked and I said this is a police shield because  
14 they had backed -- they took a step back into the hallway  
15 and I could see that it was a shield.

16 Q. So would you characterize what happened after  
17 that as something of a standoff?

18 A. Yes, ma'am.

19 Q. How long did that -- how long did that last  
20 before you surrendered?

21 A. Well, I think we surrendered about 3:30 in the  
22 morning, between 3:30 and 4:00 in the morning.

23 Q. So there was at least nine hours or something  
24 like nine hours that you were in a stressful situation.

25 What was your emotional state at the time that you were

1 taken into custody?

2 A. I think my first concern was I was relieved  
3 that it was over with.

4 Q. What was your emotional state, what kind of  
5 state were you in?

6 A. Fatigued --

7 Q. Okay.

8 A. -- emotionally.

9 Q. And was this a calm situation you had been  
10 through the previous nine hours? Was it an upsetting  
11 situation? Did it have any effect on your state of mind  
12 once you were taken into custody?

13 A. Yes, ma'am, it did. Very stressful. We went  
14 from a near death situation standoff to life, you know. And  
15 it was very stressful for us at that time.

16 Q. Okay. And you testified that you were  
17 fatigued. All kinds of fatigue. Could you be a little bit  
18 more specific what you mean when you say you were fatigued  
19 in this situation?

20 A. We basically had been operating on adrenalin  
21 for approximately 48 hours on very little rest and at the  
22 time of the arrest, it was like I said, it was relief that  
23 it was now over with and the general state of physical and  
24 emotional fatigue from that.

25 Q. Now, you have heard the testimony about being

1 taken to the police department. Did you have any quarrel  
2 with that? Were you taken into the interview room as it was  
3 described by Detective Johnson?

4 A. No, ma'am. It was pretty much.

5 Q. And how were you -- were you shirtless?

6 A. Yes, ma'am.

7 Q. Were you cold?

8 A. Yes, ma'am, I was. This is Colorado and late  
9 January. There was snow on the ground. I'm not sure what  
10 the temperature was at that time. But I was cold. I was  
11 shivering still.

12 Q. And were you given anything to wear while you  
13 were being interviewed?

14 A. No, ma'am.

15 Q. Were you offered anything to eat?

16 A. I don't remember being offered any food.

17 Q. Did you express to them a desire to have  
18 something to eat?

19 A. I can't say for certain, ma'am. I did ask for  
20 -- actually, I think I asked for a cup of coffee because I  
21 was beginning to feel drowsy, very drowsy, so I was wanting  
22 some caffeine.

23 Q. Now, when were you advised of your Miranda  
24 rights?

25 A. The actual advising, I'm very vague. That

1 period when I arrived and when my Miranda was actually  
2 stated to me.

3 Q. Why is that?

4 A. I recall when the detectives came into the  
5 room and -- but I can't recall how the conversation started,  
6 whether it was -- proceeded as the detective stated and he  
7 read the Miranda. My first recollection of it was that they  
8 asked me a question said, why was the officer run over? And  
9 I started crying.

10 Q. Were you aware that you could stop this  
11 interview?

12 A. No, ma'am.

13 Q. Do you remember being told that you could stop  
14 the interview?

15 A. I assume when he read me the Miranda, but it  
16 just didn't -- it did not dawn on me that I could stop it.

17 Q. So is that because you were lacking in  
18 intelligence or was it because of the circumstances that you  
19 found yourself in?

20 A. I don't think it was because of lack of  
21 intelligence. I think it was my mental -- the mental  
22 fatigue that I was experiencing. I just wasn't registering  
23 everything that was being said to me.

24 Q. So you don't remember specifically him telling  
25 you that and is it your testimony that it is just you simply

1 did not understand that you could stop that interview?

2 A. I remember Miranda being read to me, but I'm  
3 not sure when in the interview, whether it was when he first  
4 came into the room as he stated or my recollection was after  
5 the question after I had already started to cry.

6 Q. Do you remember if you were told that you had  
7 already started interviewing and you had to continue or  
8 whether that was something that you thought was -- why did  
9 you say that?

10 A. Ma'am?

11 Q. You just said that you thought you couldn't  
12 stop the interview. Was there anything that gave you that  
13 impression?

14 A. I was not aware of it that I could stop the  
15 interview.

16 Q. Could you detail for us why you maintain that  
17 your statement was not voluntary?

18 A. I don't think giving -- if I had had a chance  
19 to rest or perhaps Miranda had been explained to me more in  
20 detail, that I would have given a voluntary statement like I  
21 had, like I did.

22 Q. If you had access to an attorney, would you  
23 have availed yourself of that opportunity to consult with an  
24 attorney before you gave a statement?

25 A. Yes, ma'am.

1 Q. If you had been given the Miranda warnings by  
2 a magistrate, would you have felt like you had the  
3 opportunity to find out what they meant and ask questions?

4 A. It would have depended if I had had a chance  
5 to rest prior to it.

6 Q. So it's just this particular circumstances in  
7 which they questioned you when you had no rest and no food  
8 and coming from this hostage -- not hostage, standoff  
9 situation, it's your testimony that you were unable to  
10 understand your Miranda warnings?

11 A. Yes, ma'am.

12 Q. And if you were able to understand them, you  
13 would not have given this statement?

14 A. Yes, ma'am.

15 MS. BUSBEE: Pass the witness, Your  
16 Honor.

17 CROSS-EXAMINATION

18 BY MR. SHOOK:

19 Q. Mr. Murphy, so you are not saying that the  
20 Miranda warnings weren't read to you, you are just saying  
21 you didn't understand them?

22 A. Yes, sir.

23 Q. And you think that first you cried in regards  
24 to some question about why the officer was run over and it  
25 was after that that the Miranda warnings were read to you?

1 A. That's the sequence that I'm familiar with,  
2 yes, sir.

3 Q. And then after the Miranda warnings were read  
4 to you, is that when you started dictating the statement to  
5 Detective Johnson in the manner he described where you would  
6 talk some and he would write it down?

7 A. Yes, sir.

8 Q. So prior to him writing down what you were  
9 saying, he had read the Miranda warnings at that point in  
10 time?

11 A. I believe so, sir, but I'm not certain.

12 Q. Did the -- he was correct in the procedure  
13 used. You would talk and he would write?

14 A. Oh, yes, yes, sir.

15 Q. The signature on the exhibit, that's your  
16 signature, isn't it?

17 A. Yes, sir.

18 Q. He never threatened you with anything, did he,  
19 during the course of that interrogation?

20 A. No, sir.

21 Q. Didn't make any promises to you, did he?

22 A. No, sir.

23 Q. Basically, once he got in the room, he started  
24 taking the statement and it took some, what, two, two and a  
25 half hours to go through all that?

1 A. Yes, sir.

2 Q. He did allow you to go to the restroom on two  
3 occasions?

4 A. On two occasions, yes, sir.

5 Q. And you were given a Dr. Pepper?

6 A. Yes, sir.

7 Q. And you didn't -- you don't recall requesting  
8 food; is that right?

9 A. No, sir, I don't.

10 Q. So have you looked over the statement?

11 A. Yes, sir, I have.

12 Q. And he didn't go back and add anything in  
13 there that wasn't written down at that time?

14 A. No, sir.

15 Q. And you did read over the statement before you  
16 signed it?

17 A. Yes, sir.

18 Q. Now, you say that you just didn't quite  
19 understand your Miranda rights because you had been up so  
20 long?

21 A. Yes, sir.

22 Q. And you were awake, weren't you, during this  
23 conversation with Detective Johnson?

24 A. I believe at times I had actually did nod at  
25 times.



1 Q. While you were dictating the statement you  
2 would --

3 A. Yes, sir.

4 Q. -- nod off and go to sleep?

5 A. I believe so. I wouldn't say I fell asleep.  
6 But I would say I would nod out and then instantly come back  
7 up.

8 Q. You didn't think it was a pretty alert  
9 situation there, being asked questions by a detective  
10 concerning an incident that happened in Irving?

11 A. Could you say that again, sir?

12 Q. You weren't bored by the conversation?

13 A. Oh, no, sir, I wasn't bored. I was just  
14 extremely tired.

15 Q. You have heard the Miranda rights before,  
16 haven't you?

17 A. Yes, sir.

18 Q. And you, in fact, have given voluntary  
19 statements before, haven't you?

20 A. In what instance, sir?

21 Q. When you were arrested for burglary of a  
22 building back in 1984 in Balch Springs, do you recall giving  
23 a voluntary statement at that time?

24 A. Yes, sir, I did.

25 Q. Let me show you what has been marked as State

1 Exhibit 979 and ask you if you recognize that copy of the  
2 voluntary statement from that incident in Balch Springs. I  
3 believe it was October 3rd -- no?

4 A. No, sir, February.

5 Q. February 23, 1984?

6 A. Yes, sir.

7 Q. Does that look like to be a copy of the  
8 statement you gave about that burglary?

9 A. Yes, sir.

10 Q. And on that voluntary statement were some  
11 Miranda warnings; is that right?

12 A. Yes, sir, there is.

13 Q. Do you recall being given the Miranda warnings  
14 at that time --

15 A. Yes, sir, I do.

16 Q. -- before you gave the voluntary statement?  
17 Did you understand your Miranda warnings at that time?

18 A. Yes, sir.

19 Q. And subsequent to this you were arrested for  
20 aggravated sexual assault in 1984 out of Irving, Texas. You  
21 were given your Miranda warnings at that time, weren't you,  
22 when you were arrested?

23 A. Yes, sir.

24 Q. You understood them at that time?

25 A. Yes, sir.

1 Q. In fact, at that time you declined to give a  
2 statement; is that right?

3 A. That's correct.

4 Q. And prior to 1984 you had been arrested when  
5 you were a juvenile, I believe; is that right?

6 A. Yes, sir.

7 Q. And on how many occasions?

8 A. Several.

9 Q. Okay. When you were arrested on those  
10 occasions, some involving, I believe, unauthorized use of a  
11 motor vehicle, some theft, you were given Miranda warnings  
12 at that time, were you not?

13 A. I actually don't remember at that time, sir.

14 Q. Okay. But at least on these two occasions in  
15 1984 you had been given your Miranda warnings and you  
16 understood them at that time?

17 A. Yes, sir.

18 Q. Now, do you recall after you talked with the  
19 Detective Johnson, talking to some other police officers  
20 that day, or other law enforcement?

21 A. I believe there was two other groups of  
22 officers that I spoke to that morning.

23 Q. Some Colorado Springs officers, as well as  
24 some officers from the -- investigators from the Texas  
25 Department of Corrections?

1 A. Well, I do remember the officers from the  
2 Texas Department of Corrections, yes, sir.

3 Q. Do you recall them giving you -- they gave you  
4 your Miranda warnings before you gave them a statement?

5 A. I believe they did give me the Miranda  
6 warnings, yes, sir.

7 Q. Did you understand your Miranda warnings at  
8 that time?

9 A. I would say that I agreed to it, but I'm not  
10 sure if I really understood them, because, once again, my  
11 fatigue played a big factor at that time.

12 Q. Okay. So did you nod off or anything at that  
13 point in time, also?

14 A. I believe so, sir.

15 Q. Would your fatigue have been noticeable?

16 A. Yes, sir.

17 Q. In other words, if anyone was talking to you,  
18 you could tell that you were very, very fatigued?

19 A. Yes, sir.

20 Q. Mr. Murphy, do you recall when the  
21 investigators from the prison system talked to you, they had  
22 a recorder sitting there?

23 A. Yes, sir.

24 MR. SHOOK: Judge, I have a copy of the  
25 tape and I think that we have a recorder back there that we

1 can play that --

2 Q. (By Mr. Shook) I'll play this tape and I  
3 think it would be apparent that the voice is identified, but  
4 if you have any disagreement whether that's you or not, will  
5 you let me know right away?

6 A. Yes.

7 MS. BUSBEE: Before we do this, could we  
8 have this exhibit sponsored by a witness who may actually  
9 know what time it was taken and under what conditions?

10 MR. SHOOK: I believe they state the name  
11 and identify themselves on it.

12 THE COURT: Give him an opportunity to  
13 hear the beginning of the tape so he has an opportunity to  
14 --

15 MR. SHOOK: Judge, for the record, this  
16 is State Exhibit 980.

17 [At this time the tape was played by  
18 Mr. Shook.]

19 MS. BUSBEE: May I take the witness on  
20 voir dire?

21 THE COURT: You may.

22 VOIR DIRE EXAMINATION

23 BY MS. BUSBEE:

24 Q. Mr. Murphy, this states on this tape this was  
25 taken at 12:28 p.m. Your confession was taken, I believe,

1 at 4:00.

2 THE COURT: 4:21 a.m.

3 Q. (By Ms. Busbee) Had you had an opportunity to  
4 eat before this interview?

5 A. I'm not sure what time the lunch was brought  
6 around. I know when I showed up at the detention facility I  
7 did ask about food and I'm not sure if I was fed at that  
8 time or not.

9 Q. Were you given a cell and a place to sleep?

10 A. Yes, ma'am.

11 Q. Did you get an opportunity to sleep before  
12 this interview?

13 A. Approximately 12:30 in the afternoon, yes,  
14 ma'am, they woke me up.

15 Q. They woke you up for this interview?

16 A. Yes, ma'am.

17 Q. So you had an opportunity to have --

18 A. For a couple of hours.

19 Q. -- to have some sleep before this interview?

20 All right.

21 MS. BUSBEE: Your Honor, I'm going to  
22 object to this tape as irrelevant, the issue of his fatigue  
23 since this happened after he had had an opportunity to get  
24 some rest.

25 THE COURT: I believe the issue put

1 before the Court is was he capable of understanding the  
2 Miranda warnings and did he understand his Miranda warnings  
3 at the time he made this statement.

4 MS. BUSBEE: Right. So this is  
5 irrelevant as to -- something that occurred hours later  
6 after he slept is not relevant to this issue.

7 THE COURT: I believe it's highly  
8 relevant and probative, so I will admit State 980.

9 MR. SHOOK: We'll offer 980.

10 Q. (By Mr. Shook) And, Mr. Murphy, that's your  
11 voice that we are hearing on 980?

12 A. Yes, sir.

13 Q. And that is the -- sound like the interview  
14 you were having with the officers around 12:30 p.m. on the  
15 24th of January 2001?

16 A. Yes, sir. Could I request -- could you back  
17 up just a little bit to where he started reading the  
18 Miranda, please?

19 [At this time the tape was backed up  
20 and replayed by Mr. Shook.]

21 MR. SHOOK: Judge, there is one portion  
22 coming up that I think it will -- I don't know exactly where  
23 to fast forward it to. It's not long.

24 Q. (By Mr. Shook) That's you being informed that  
25 there was a lawyer there for you and you agreed to continue

1 talking with the investigators; is that right?

2 A. Yes, sir.

3 Q. Okay. Mr. Murphy, you sound on the tape, at  
4 least from the sound of your voice, you don't sound too  
5 fatigued.

6 A. No, sir. It was very refreshing, refreshed my  
7 memory, and, no, I do not sound fatigued there.

8 Q. Clearly you understood your Miranda rights and  
9 what was being said to you and explained to you during that  
10 interview?

11 A. Yes, sir, because the investigator did clearly  
12 go over each phase, each clause, of the Miranda with me and  
13 made sure that I understood it.

14 Q. Earlier when I first began asking you  
15 questions, you said that you were just as fatigued during  
16 this interview and didn't understand your Miranda rights the  
17 same way you did when Detective Johnson was talking to you.

18 A. Yes, sir, I did. And the tape has refreshed  
19 my memory. It was approximately three years ago.

20 Q. Could you also have been just as alert when  
21 Detective Johnson was going over it with you?

22 A. No, sir.

23 Q. So it's clear for the record, the tape we just  
24 listened to is all done in the same day, approximately 12:30  
25 p.m. or so the same day that you had given the written



1 voluntary statement to Detective Johnson; is that right?

2 A. Yes, sir.

3 Q. I may have asked you this, but as far as the  
4 actual contents of State Exhibit 978, you have read that  
5 since then?

6 A. Yes, sir, I have.

7 Q. Everything in it was true and correct as you  
8 dictated it to Detective Johnson?

9 MS. BUSBEE: Your Honor, I object to him  
10 stating whether or not what he put in his statement is true  
11 and correct. We're here for the purpose of whether or not  
12 it's voluntary.

13 THE COURT: I understand that, but he's  
14 asking if there were any things that were not correct or had  
15 been changed with regard to the statement, not to the  
16 content of the statement.

17 MS. BUSBEE: If we could make that clear,  
18 because that's not how I heard the question.

19 Q. (By Mr. Shook) Has anything -- I think I  
20 asked you this earlier, has anything been changed or added  
21 into since you had written that -- or since it had been  
22 dictated?

23 A. I don't believe so.

24 MR. SHOOK: And, Your Honor, we'll also  
25 offer State Exhibit 979 for record purposes.

1 MS. BUSBEE: No objection for record  
2 purposes.

3 THE COURT: No. 979 shall be admitted for  
4 the record.

5 MR. SHOOK: That's all the questions we  
6 have.

7 REDIRECT EXAMINATION

8 BY MS. BUSBEE:

9 Q. Just a few more questions, Mr. Murphy. This  
10 interview that you had with the TDC officials, they talked  
11 about some administrative regulations. This interview had  
12 to do with violations of inmate code. Isn't that what this  
13 interview -- this entire interview was not about this  
14 offense for which you are on trial, but it's concerned with  
15 collateral matters to the escape and other people's  
16 participation; is that correct?

17 A. Yes, ma'am.

18 Q. And you did not sign a written statement?

19 A. No, ma'am, I did not.

20 Q. And you had had an opportunity to sleep?

21 A. Yes, ma'am.

22 Q. And the fact that you had an opportunity to  
23 sleep and was your mental clarity different than it had been  
24 at the time that you gave the statement to Detective  
25 Johnson?

1 A. Yes, ma'am.

2 Q. All right.

3 MS. BUSBEE: Pass the witness, Your  
4 Honor.

5 THE COURT: Thank you, Mr. Murphy. You  
6 may stand down.

7 THE COURT: Call your next witness.

8 MS. BUSBEE: We'll rest.

9 MR. SHOOK: We have nothing further,  
10 Judge. We'll call Detective Johnson briefly.

11 RANDALL JOHNSON,  
12 having been duly sworn, was examined and testified as  
13 follows:

14 DIRECT EXAMINATION

15 BY MR. SHOOK:

16 Q. For the record are you the same Detective  
17 Johnson that testified earlier?

18 A. Yes, sir.

19 Q. During your interview with Mr. Murphy, would  
20 you describe his demeanor throughout the interview?

21 A. Would I describe it?

22 Q. Yes.

23 A. Yes, sir.

24 Q. Was -- did he appear awake or alert to you?

25 A. Yes, sir.

1 Q. Did he appear to be awake and alert during the  
2 entire interview?

3 A. Yes, sir.

4 Q. Did he ever fall asleep during the interview  
5 at all or at any time or look as if he was about to fall  
6 asleep?

7 A. No, sir.

8 Q. Did he appear to understand all the warnings  
9 that you gave him as far as the Miranda warnings go?

10 A. Yes, sir.

11 Q. That's all we have.

12 CROSS-EXAMINATION

13 BY MS. BUSBEE:

14 Q. Were these --

15 MS. BUSBEE: I have no questions, Your  
16 Honor.

17 MR. SHOOK: That's all we have.

18 THE COURT: Thank you, Detective.

19 MR. SHOOK: We'll close.

20 MS. BUSBEE: Close.

21 (Recess)

22 THE COURT: Defendant's Motion to  
23 Suppress the voluntary statement made by the defendant on  
24 the 24th day of January 2001, concluding at 4:21 a.m., the  
25 Court, having received evidence on this issue, does the

1 State have any -- your motion, Ms. Busbee, would you like to  
2 argue your motion?

3 MS. BUSBEE: Yes, Your Honor. I think  
4 that the evidence is clear that the defendant was -- it's  
5 uncontradicted that they were in a standoff situation from  
6 nighttime until early morning hours, that it was a tense  
7 situation, that the defendant hadn't had sleep, obviously.  
8 This caused him to have a decreased mental capacity because  
9 of the sleep deprivation and, obviously, they weren't  
10 bringing him room service under these situations, so he  
11 hadn't had anything to eat. It was obviously great  
12 emotional stress.

13 There was some questions in the  
14 defendant's mind as to whether or not he was going to live  
15 or die immediately prior to the time that he was taken into  
16 questioning. And that those things factored into the fact  
17 that he was not able to adequately understand the Miranda  
18 warnings and to give them their constitutional effect.

19 Anticipating the prosecution's argument  
20 about prior statements made in 1984, I just point out to the  
21 Court that these were made under different circumstances,  
22 that the questioning given when he had had an opportunity to  
23 rest, not under this situation, the last time he was asked  
24 that question by law enforcement he declined to give a  
25 statement.

1           And I think that that argument cuts more in  
2 support of my Motion to Suppress than against it, because  
3 well rested and in his right mind the last time he had been  
4 asked to give a written statement, he declined to do so.

5           And I would ask the Court to suppress his  
6 confession in this case based on the evidence and the law.

7           MR. SHOOK: Judge, we feel the statement  
8 is given voluntarily and he was fully apprized of his  
9 Miranda rights and understood them. Detective Johnson  
10 testified that he was alert throughout the interview. He  
11 understood the rights and waived them.

12           Comparing his testimony versus the  
13 defendant's, I think the defendant obviously has a long  
14 arrest history. You know in 1984 he was given his Miranda  
15 rights on one occasion and he said he understood them and he  
16 gave a voluntary statement. On another occasion when he was  
17 arrested for sexual assault, he understood the rights and  
18 declined to give a statement. He clearly knows what his  
19 Miranda rights are.

20           On this particular case on this  
21 particular day, he later gave an oral statement to prison  
22 officials. And you recall when I first asked him questions,  
23 he said that he was just as fatigued as he was with  
24 Detective Johnson and didn't understand his Miranda rights  
25 at this time, but then clearly after the tape is played,

1 he's clearly not fatigued at all. He's wide awake and  
2 understands what is going on. And at one point in the tape,  
3 he even turns down talking to a lawyer so he can continue  
4 talking to these detectives.

5           Clearly he knows what's going on. He  
6 says that he was without a shirt and shivering. I don't  
7 know about you, Judge, but when I'm cold and shivering, the  
8 last thing that comes to me is sleep. So I think that goes  
9 to more of the fact that he was awake.

10           He was in a standoff situation, a lot of  
11 adrenalin flowing. I don't think that he's going to fall  
12 asleep right after the confrontation he had with the police.  
13 I think clearly the evidence as produced by the State shows  
14 the statement was given freely and voluntarily.

15           THE COURT: Mr. Murphy, I have obviously  
16 had a lot of time to think about these issues as presented  
17 here to the Court today.

18           The Court will make the following  
19 observations and findings of facts, that the statement that  
20 was recorded by Detective Johnson before Mr. Murphy  
21 concluding at 4:21 -- started at 4:21 a.m. on the 24th day  
22 of January, 2001, given your testimony and the testimony  
23 that the Court has heard, that wasn't the standoff was 9  
24 hour or 19 hours, this was very quickly after the individual  
25 was in custody and really no delay in going to the interview

1 room, other than the procedural delays in transporting from  
2 the arrest location to the secure jail facility. But there  
3 was no extensive delay. It wasn't immediate, but it wasn't  
4 -- it was processed in a timely manner.

5 And, Mr. Murphy, your own testimony that  
6 you had just come through a life or death situation, it  
7 defies logic that your testimony would be that I was on an  
8 adrenalin rush just an hour before and no longer able to  
9 stay awake during this interview.

10 In addition to that, the issue is did you  
11 understand your warnings and were you capable of terminating  
12 the interview. The Court has to look at the totality of all  
13 the evidence. And looking at your previous history back --  
14 I know it's 20 years ago, but 1984, you had an opportunity  
15 to make one statement and you chose to do so and you had an  
16 opportunity to make another statement and you chose not to  
17 do so.

18 Obviously you understood your rights then  
19 and you understood your rights some eight hours after this  
20 statement was begun when you chose to, on the audio tape,  
21 when you chose to waive your rights and talk with the  
22 investigators from TDCJ and, in fact, had an opportunity to  
23 speak with a lawyer and chose to not avail yourself of that  
24 opportunity, but continue with the interview.

25 The Court finds that the defendant freely



1 and voluntarily made an informed decision to waive his  
2 rights and to provide the statement and there was no threat,  
3 no coercion, no promises made to the defendant in having him  
4 make this statement. The Court finds the statement will be  
5 admissible before this jury. That will conclude this  
6 hearing.

7 [End of Volume]  
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1 STATE OF TEXAS \*

2 COUNTY OF DALLAS \*

3 I, NANCY BREWER, Official Court Reporter for the 283rd  
4 Judicial District Court, do hereby certify that the above  
5 and foregoing constitutes a true and correct transcription  
6 of all portions of evidence and other proceedings requested  
7 in writing by counsel for the parties to be included in this  
8 volume of the Reporter's Record, in the above-styled and  
9 numbered cause, all of which occurred in open court or in  
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 2008~~4~~

13  
14  
15 Nancy Brewer  
16 NANCY BREWER, CSR, NO. 5759  
17 Expiration Date: 12-31-04  
18 Official Reporter, 283rd JDC  
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VOLUME 39 OF 61 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS \* IN THE DISTRICT COURT  
VS. \* DALLAS COUNTY, TEXAS  
PATRICK HENRY MURPHY, JR. \* 283RD DISTRICT COURT

\*\*\*\*\*

HEARING ON JUROR QUALIFICATION

MARTY INGLE

\*\*\*\*\*

FILED IN  
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 6th day of November, 2003, the following  
proceedings came on to be heard in the above-entitled and  
numbered cause before the Honorable Vickers L. Cunningham,  
Sr., Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by machine shorthand.

ORIGINAL

A P P E A R A N C E S

APPEARING FOR THE STATE

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And

Mr. Bill Wirskye  
SBOT NO. 00788696

And

Ms. Lisa Smith  
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Assistant District Attorneys  
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APPEARING FOR THE DEFENDANT

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WITNESS INDEX

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>VOL.</u>
Marty Ingle	4	5	39

EXHIBIT INDEX

<u>EXHIBIT</u>	<u>IDENT.</u>	<u>OFFER</u>	<u>ADMIT</u>	<u>VOL.</u>
Crt. 1	Residence Info	8	8	39

1                                   P R O C E E D I N G S

2                   THE COURT: Ready for Mr. Ingle.

3                                   (Prospective juror in)

4                   THE COURT: Good morning. Please have a  
5 seat. Let the record reflect we've got Marty Ingle, a juror  
6 who has been seated on the trial of Patrick Henry Murphy,  
7 Jr. Mr. Ingle, I don't recall -- I can look up the date.  
8 You were here a couple of months ago. You were informed  
9 that you had been selected to be on the jury.

10                               We had a hearing last Friday, the 31st  
11 day of October. At that time we received a telephone call  
12 from you that you were, in fact, unable to attend and, in  
13 fact, moving. It has been brought to the attention of the  
14 Court that you may no longer be qualified to sit on this  
15 case. Mr. Shook, would you like to inquire?

16                               MR. SHOOK: Yes, sir.

17                               MARTY INGLE,  
18 having been duly sworn, was examined and testified as  
19 follows:

20                                   DIRECT EXAMINATION

21                   BY MR. SHOOK:

22                   Q.       It's my understanding that you have, in fact,  
23 moved to -- is it Rockwall County?

24                   A.       Yes, sir.

25                   Q.       And that's your residence as of when you moved

1 -- was it last week, week before last, the first -- 31st?

2 A. It was something like that.

3 Q. The 31st, yeah, of October. So now you are no  
4 longer a resident of Dallas County; is that right?

5 A. That's correct, sir.

6 Q. Okay. And you anticipate you will be staying  
7 there at least through the course of this trial, if not much  
8 longer?

9 A. Yes, sir.

10 MR. SHOOK: That's all the questions that  
11 I have.

12 CROSS-EXAMINATION

13 BY MS. BUSBEE:

14 Q. Mr. Ingle, did you provide your new address to  
15 the Court so that they could verify that it was in Rockwall  
16 County? You don't have to tell it here in open court, but  
17 did you do so?

18 A. I don't know if did I or not. I don't  
19 recollect it.

20 THE COURT: Do you have any documentation  
21 showing a lease or closing statement or anything showing  
22 that you have now moved to Rockwall County?

23 PROSPECTIVE JUROR: Yes, sir. Here's the  
24 address and a settlement statement.

25 THE COURT: We don't want to get too

1 personal. I just need to verify.

2 PROSPECTIVE JUROR: Here's a survey plat,  
3 if you need it.

4 MR. SHOOK: Judge, if we could --

5 MS. BUSBEE: Just for the record.

6 MR. SHOOK: Just for the record we will  
7 make a copy of the first page.

8 MS. BUSBEE: Is that all right with you?

9 PROSPECTIVE JUROR: Sure. If that's all  
10 you need. I have a survey plat, if you need it.

11 Q. (By Ms. Busbee) And that has Rockwall County  
12 on it, doesn't it?

13 A. Yes, ma'am.

14 Q. We need to do everything right in this case to  
15 make sure.

16 THE COURT: Mr. Ingle, sorry, but you  
17 will be unable to serve on this jury. I've heard a lot of  
18 people trying to avoid jury service, but this is always a  
19 first. People move outside of Dallas County. But when we  
20 started in May, you never know where you are going to end  
21 up. We appreciate you are coming down. I know it was an  
22 inconvenience on your time.

23 But, as Ms. Busbee said, we have to be  
24 very careful. We have to be sure our record is very clear  
25 and very accurate.



1 Does the State have any objection to  
2 excusing Mr. Ingle for lack of qualification?

3 MR. SHOOK: No, sir.

4 THE COURT: Defense?

5 MS. BUSBEE: No, Your Honor.

6 THE COURT: Mr. Ingle, you now are not  
7 qualified to serve in this Court. I shall be sure to inform  
8 Judge Hall in Rockwall County that you are now a resident  
9 and able to serve in his court.

10 PROSPECTIVE JUROR: Did you say a  
11 resident or arrested?

12 THE COURT: A resident.

13 PROSPECTIVE JUROR: After a while, I  
14 might get arrested.

15 MS. BUSBEE: Give this table a call when  
16 you do.

17 THE COURT: Off the record.

18 [Off the record]

19 THE COURT: Back on the record.  
20 Mr. Shook, would you mark that copy a Court's exhibit? And  
21 now, obviously, we're into our alternates. Any objection to  
22 seating Timothy Becher as juror No. 12?

23 MS. BUSBEE: Your Honor, it's my  
24 understanding that numerically and as far as the order that  
25 we picked, he's the next juror; is that correct?

1 THE COURT: That's correct.

2 MS. BUSBEE: Then no objection. I mean,  
3 other than what has already been raised before the Court as  
4 far as the selection process is concerned. We agree that he  
5 would be the next seated juror and since Mr. Ingle is not  
6 qualified, it follows that he would be the twelfth juror.

7 THE COURT: Mr. Wirskye, does the State  
8 have any objection?

9 MR. SHOOK: We have no objection.

10 THE COURT: Now, the next issue is, are  
11 we comfortable proceeding now with just one alternate juror?

12 MS. BUSBEE: Works for me, particularly  
13 considering who it is.

14 MR. SHOOK: Yes.

15 THE COURT: Otherwise, I will get on the  
16 phone and round people up for tomorrow, if you want to talk  
17 to some more folks.

18 MR. SHOOK: No, I think we'll be fine.  
19 And we've marked the residence information as Court's  
20 Exhibit No. 1 and offer that for the record.

21 MS. BUSBEE: No objection.

22 THE COURT: Court's Exhibit 1 shall be  
23 admitted for the record. Anything else before we see each  
24 other first thing early Monday morning?

25 MR. SHOOK: Beginning at 8:30, Judge?

1 THE COURT: Yes, sir. Jury in the box at  
2 8:30.

3 MS. BUSBEE: I can't think of anything  
4 that we would need to talk about before then. If I do, I  
5 will apprise you.

6 [End of Volume]  
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1 STATE OF TEXAS \*

2 COUNTY OF DALLAS \*

3 I, NANCY BREWER, Official Court Reporter for the 283rd  
4 Judicial District Court, do hereby certify that the above  
5 and foregoing constitutes a true and correct transcription  
6 of all portions of evidence and other proceedings requested  
7 in writing by counsel for the parties to be included in this  
8 volume of the Reporter's Record, in the above-styled and  
9 numbered cause, all of which occurred in open court or in  
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 20034

13  
14  
15 Nancy Brewer  
16 NANCY BREWER, CSR, NO. 5759  
17 Expiration Date: 12-31-04  
18 Official Reporter, 283rd JDC  
19 Frank Crowley Crts. Bldg. LB33  
20 133 No. Industrial Blvd.  
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23  
24  
25

74851

REPORTER'S RECORD

VOLUME 40 OF 61 VOLUMES

TRIAL COURT CAUSE NO. F01-00328-T

STATE OF TEXAS \* IN THE DISTRICT COURT  
VS. \* DALLAS COUNTY, TEXAS  
PATRICK HENRY MURPHY, JR. \* 283RD DISTRICT COURT

\*\*\*\*\*

JURY TRIAL

\*\*\*\*\*

**FILED IN**  
COURT OF CRIMINAL APPEALS

MAR 9 - 2004

Troy C. Bennett, Jr., Clerk

On the 10th day of November, 2003, morning session,  
the following proceedings came on to be heard in the  
above-entitled and numbered cause before the Honorable  
Vickers L. Cunningham, Sr., Judge Presiding, held in Dallas,  
Dallas County, Texas.

Proceedings reported by machine shorthand.

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A P P E A R A N C E S

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WITNESS INDEX

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>VOL.</u>
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P R O C E E D I N G S

THE COURT: Prior to bringing in the jury and swearing the jury, I have been tendered a motion from the defense. Ms. Busbee, would you like to argue your motion on the record?

MS. BUSBEE: Your Honor, I think it speaks for itself. This morning and only this morning was -- did the defense learn that over the weekend things have been published in a local paper where the District Attorney had violated the Court's gag order and in a rather blatant fashion.

I have asked in my motion for continuance for a day in order to determine some of these matters that I have put into the motion that is before the Court. At this point I don't know -- I don't have enough information to know whether or not I should move to quash this panel or do any other things that might guarantee my client a fair trial.

This Court and the appellate courts have ruled in this case with this gag order that it's necessary and vital and important to suppress our first amendment rights to make statements about this case in order that a fair trial might be held.

And having made that prior ruling, I feel that it's incumbent upon me to inquire into what happened,

1 what other statements may be out there ready to be  
2 disseminated to the public and potentially to this jury, and  
3 -- the necessity for the gag order was clear and upheld.  
4 And when it's violated, I think that it's incumbent upon me  
5 to inquire prior to the commencement of this case as to  
6 whether or not constitutional violations have occurred and  
7 as to whether or not this man can receive a fair trial and  
8 to whether or not there should be sanctions.

9 And I don't know at this point without a  
10 continuance whether I -- I'm going to have to move to quash  
11 this panel based on this violation of the gag order without  
12 having any further information.

13 THE COURT: Ms. Busbee, this jury has  
14 been instructed by myself no less than three times orally  
15 and in writing at least twice, once of which I read to the  
16 jury aloud on the record not to read any news coverage on  
17 this matter.

18 So as far as quashing this panel at this  
19 time, I will inquire if anyone has read anything in the  
20 paper, violating the orders of the Court. If no one  
21 acknowledges they have done so, then I shall proceed.

22 As far as allowing you to present issues  
23 on this motion, you may do so. You may make a bill. But  
24 we're not going to delay this trial at this time, unless the  
25 jury has violated my ruling.

1 MS. BUSBEE: May I ask the Court to make  
2 that inquiry, have you read anything in the newspaper,  
3 instead of have you read anything in the newspaper in  
4 violation of the Court order?

5 THE COURT: Well, I probably would need  
6 to narrow the question, have you read anything in the paper  
7 since I instructed you not to do so?

8 MS. BUSBEE: Furthermore, Your Honor, I  
9 need -- I would like to have a hearing on this violation of  
10 the gag order.

11 THE COURT: You would be able to have a  
12 hearing.

13 MS. BUSBEE: Well, can the Court tell me  
14 when that might be?

15 THE COURT: Not while the jury is waiting  
16 on us.

17 MS. BUSBEE: Today perhaps?

18 THE COURT: At the end of the day will be  
19 fine.

20 MS. BUSBEE: Would the Court issue some  
21 subpoenas?

22 THE COURT: All you have to do is prepare  
23 them.

24 MS. BUSBEE: I guess I will have to find  
25 somebody on a break to do that for me.

1                   Your Honor, at this time I'm going to ask  
2 the Court officially to quash the panel.

3                   THE COURT: Motion denied.

4                   MS. BUSBEE: And I ask for the Court to  
5 carry that motion through which -- and I assume this will be  
6 on the record but outside the presence of the parties, this  
7 inquiry into whether or not anything has been read and --  
8 Your Honor, you nodded. For the record you are giving me  
9 permission to have that as a running request?

10                  THE COURT: Yes, ma'am. Sheriff, we need  
11 a jury.

12                   [Off the record]

13                  MS. BUSBEE: I've just been apprised of  
14 something else also contained in that motion, Your Honor, is  
15 a second violation of the gag order. The first -- State's  
16 first witness will be a witness who has violated the gag  
17 order.

18                   And my client was sanctioned for  
19 violation of the gag order and it had teeth in it at that  
20 time. And I'm asking the Court that this witness not be  
21 allowed to testify because she has violated this Court's  
22 order.

23                  THE COURT: Mr. Shook.

24                  MR. SHOOK: Judge, I don't think if Ms.  
25 Hawkins did, in fact, violate a gag order, I don't think

1 that would prevent her being called as a witness in this  
2 case. She's a fact witness. You have heard Ms. Hawkins'  
3 testimony is short and brief, but obviously very essential.  
4 And I don't think that in any way prevents her from being  
5 called as a witness.

6 I was looking from Ms. Busbee's  
7 attachment to see exactly -- where is it? I don't think  
8 that would necessitate her being barred from testifying as a  
9 witness. It looks like there's a quote from Mr. Murphy in  
10 here, too. When it occurred, I don't know, but --

11 THE COURT: That's the problem. We've  
12 been through this series of issues five times. So it's very  
13 difficult to pull it out. Motion is denied. She may  
14 testify.

15 [Jury in]

16 THE COURT: Good morning, good morning.  
17 If you would, before you are seated, I do have one question  
18 for you. Has anyone read anything about this case since the  
19 last time we had a hearing here on Halloween, October 31st?  
20 Anything in the paper? I see everyone shaking their heads  
21 no. Anybody yes? Very well.

22 If you would, please raise your right  
23 hands. Now I need to swear each of you in as a juror in  
24 this case.

25 [At this time the jury was sworn by

1 the Court.]

2 THE COURT: Thank you. You may be  
3 seated. Mr. Shook, is the State ready?

4 MR. SHOOK: State is ready.

5 THE COURT: Defense?

6 MS. BUSBEE: Subject to the previous  
7 motion, we're ready, Your Honor.

8 THE COURT: Mr. Shook, would you like to  
9 present your indictment?

10 MR. SHOOK: Folks, I would like to  
11 reintroduce myself. My name is Toby Shook and at this time  
12 it's my duty to read to you the true bill of indictment in  
13 this case which reads as follows.

14 "True bill of indictment. In the name and by  
15 the authority of the State of Texas, the Grand Jury of  
16 Dallas County, State of Texas, duly organized in the January  
17 term A.D. 2001 of the 282nd Judicial District Court, Dallas  
18 County, in said Court at said term do present that one  
19 Patrick Henry Murphy, Jr., defendant, on or about the 24th  
20 day of December A.D. 2000, in the County of Dallas and said  
21 State, did unlawfully then and there knowingly and  
22 intentionally cause the death of Aubrey Hawkins, an  
23 individual, hereinafter called deceased by shooting the said  
24 deceased with a firearm, a deadly weapon. Said deceased was  
25 a peace officer, namely City of Irving police officer, then



1 and there acting in the lawful discharge of an official duty  
2 and said defendant then and there knew the said deceased to  
3 be a peace officer.

4 "And further unlawfully then and there  
5 intentionally caused the death of Aubrey Hawkins, an  
6 individual, hereinafter called the deceased by shooting the  
7 said deceased with a firearm, a deadly weapon, and the  
8 defendant then and there was then and there in the course of  
9 committing and attempting to commit the offense of robbery  
10 of Wesley Ferris against the peace and dignity of the State,  
11 Bill Hill, Criminal District Attorney of Dallas County,  
12 Texas, and signed by the foreman of the Grand Jury."

13 THE COURT: Mr. Sanchez, Ms. Busbee, how  
14 does your client plead?

15 MR. SANCHEZ: Not guilty, Your Honor.

16 THE COURT: Opening remarks?

17 MR. SHOOK: Yes, Your Honor. May it  
18 please the Court.

19 THE COURT: Mr. Shook.

20 MR. SHOOK: Members of the jury, on  
21 Christmas Eve of 2000 there was a nine-year-old boy named  
22 Andrew Hawkins who came to Irving, Texas, to the Olive  
23 Garden Restaurant to have dinner with his father. His  
24 step-mother had to bring him to that restaurant because his  
25 father was an Irving police officer named Aubrey Hawkins who

1 was on duty that evening.

2 He arrived there with the rest of his  
3 family, had dinner with his father, and approximately 6:25  
4 p.m. he said goodbye to him in that parking lot and watched  
5 him drive away. It's the last time Andrew Hawkins would see  
6 his father alive.

7 Within ten minutes Aubrey Hawkins would  
8 be lying behind an Oshman's Sporting Goods Store bleeding  
9 from 11 gunshot wounds, shot during a robbery, a robbery  
10 conducted by these seven men, this defendant, Patrick  
11 Murphy, and his accomplices.

12 The evidence will show that he is  
13 responsible under the facts and law for this crime.  
14 We will prove to you over the course of the next several  
15 days Mr. Murphy's guilt. We will do so by bringing you  
16 several witnesses from the Oshman's who can detail to you  
17 how that crime occurred, the roles of the many people  
18 involved.

19 We will do so by presenting physical  
20 evidence to you which ties the defendant to this crime. We  
21 will do so by producing scientific evidence which will show  
22 five different weapons were used in the murder of Officer  
23 Hawkins. And we will do so by the actual words of Patrick  
24 Murphy by presenting his voluntary confession, a nine-page  
25 confession, in which he details his role and his intentions

1 in this crime.

2           You will recall from jury selection that  
3 we talked to you in great detail, each and every one of you,  
4 about capital murder, how the law is applied, what the  
5 procedures were. That someone could be prosecuted for  
6 capital murder if they were the actual triggerman and also  
7 if they were an accomplice. Each of you agreed with that  
8 law.

9           We talked to you and explained how the  
10 law works as far as accomplices and we told each and every  
11 one of you that that was the theory of law that we were  
12 prosecuting the defendant under.

13           As you recall we said that if someone is  
14 actively participating in the crime, if they aid, direct,  
15 attempt to aid a person committing the crime, then they can  
16 be held responsible. That's one theory.

17           The other theory is the law of  
18 conspiracy. If two or more people enter into a conspiracy,  
19 an agreement, to commit one crime and during the course of  
20 committing that crime, one of those conspirators commits  
21 another crime to further it, all persons part of that  
22 conspiracy can be held accountable, even if they didn't have  
23 the intent to commit murder in this case, if the facts show  
24 they should have anticipated that crime could occur.

25           Over the next several days we will

1 present facts to show beyond all doubt that Patrick Murphy  
2 anticipated violence would occur out there. And as this  
3 evidence unfolds to you, it will be very apparent to you why  
4 we have the law of parties, why the law allows us to  
5 prosecute accomplices in a capital murder situation. The  
6 facts will show that this is a textbook example --

7 MR. SANCHEZ: Your Honor, I object at  
8 this time, exceeding the scope of opening arguments.

9 THE COURT: Overruled.

10 MR. SHOOK: A textbook example of why  
11 this law is prosecuted under the law of parties. The facts  
12 will show that on December 13th, eleven days before this  
13 crime, Patrick Murphy, along with George Rivas, Michael  
14 Rodriguez, Donald Newbury, Joseph Garcia, Randy Halprin, and  
15 Larry Harper escaped from the Connally Unit, a prison unit  
16 located about 60 miles southeast of San Antonio.

17 When they made their escape they made off  
18 with some weapons, a .12 gauge pump shotgun, an AR-15  
19 assault rifle, and fourteen .357 revolvers, along with  
20 ammunition. These are the weapons that were later used to  
21 murder Aubrey Hawkins.

22 The evidence will show that they arrived  
23 in this area. Their goal and their intent was to look for a  
24 sporting goods store so they could increase their armory.  
25 They wanted a wide range of weaponry. They finally settled

1 on the Oshman's Sporting Goods Store located in Irving,  
2 Texas, just off Highway 183.

3 The evidence will show that they didn't  
4 pick this store on a whim, or they didn't drive by and  
5 decide on this crime on the spur of the moment, but it was  
6 carefully planned out over several days, that they looked at  
7 that store and planned for every possible scenario which  
8 might occur.

9 The evidence will show that they actually  
10 went to the store and cased it. They got the layout of the  
11 store. The evidence will show that they went and got a  
12 number of -- a count of how many employees they anticipated  
13 would be there.

14 They obtained radios, two-way radios, so  
15 they all could communicate with each other during this  
16 crime. The evidence will show they even obtained a police  
17 scanner and that Patrick Murphy himself programed that  
18 scanner so that he would have every Irving police agency  
19 frequency on there and could monitor the police activities.

20 They obtained civilian clothes. They  
21 even went as far as to obtain clothes that looked like  
22 security guards with a badge and a hat. They had code names  
23 that they would use over the radio.

24 The evidence will show the planning is so  
25 detailed that it would resemble a military operation, an

1 all-out assault on that store before it's all over, each one  
2 acting with a specific role. The evidence will show that  
3 this crime could not be pulled off, could not be completed  
4 without the complete cooperation of all seven men, acting as  
5 a team, each with a specific role. They went over their  
6 roles and they prepared their weapons.

7           The plan called for at closing time on  
8 Christmas Eve, 6:00 p.m., for them to take down 17  
9 employees. The first people in the store would be Randy  
10 Halprin and Michael Rodriguez, posing as Christmas shoppers,  
11 would go in before closing time to gather up clothing.  
12 Several minutes later the plan called for Donald Newbury and  
13 Joseph Garcia to go in and go to other parts of the store,  
14 posing as shoppers. All would be armed with .357  
15 revolvers. All would have two-way radios on them so they  
16 could communicate, some with earphones.

17           Shortly before the store closed, George  
18 Rivas and Larry Harper would then enter the store dressed as  
19 security guards. They had even taken the time to prepare a  
20 fake photo lineup. The story they would use on the managers  
21 would be that they were looking at a grab-and-run gang and  
22 needed to interview employees about possibly identifying  
23 suspects or people that had been in that store. They would  
24 gather all the employees up. Once they had them in one  
25 place, pull their guns, search them, tie them up, take them

1 to another room, and then take the property they wanted from  
2 the Oshman's.

3           The man with one of the most important  
4 roles would be Patrick Murphy. In fact, his code name would  
5 be Angel for guardian angel. And in his own words he was  
6 the lookout and the backup. He would wait outside the  
7 store, monitor the radio activity, and communicate directly  
8 with George Rivas and the others to let them know if any  
9 police officers were arriving. He would be armed with four  
10 weapons, two .357 revolvers, a 12-gauge shotgun, and the  
11 AR-15 assault rifle.

12           The evidence will show that they weighed  
13 the pros and cons and Mr. Murphy himself was worried about  
14 the amount of employees involved in this type of robbery and  
15 the quick response team from the Irving Police Department,  
16 which clearly shows his intention and his anticipation as to  
17 the possible violence that could occur in a crime such as  
18 this.

19           They arrived at the store about 20  
20 minutes before closing, about the same time Officer Hawkins  
21 was arriving at the Olive Garden Restaurant less than a mile  
22 away on the other side of Highway 183. He was meeting his  
23 nine-year-old boy there, Andrew Hawkins, along with his  
24 wife, Lori. His mother was also joining them there with her  
25 92-year-old mother, Aubrey Hawkins' grandmother.

1                   They had Christmas dinner. He was on  
2 duty. He was in uniform. The evidence will show about 6:25  
3 p.m. as he left that store, left that restaurant, he was  
4 then summoned to the Oshman's.

5                   Shortly before 6:00 Mr. Murphy and his  
6 accomplices began to execute their plan. And as planned,  
7 Mr. Halprin and Mr. Rodriguez went into the store and began  
8 gathering up items. Soon after that, Mr. Newbury went to  
9 the gun section and Mr. Garcia to the shoe section.

10                  Right before closing, Mr. Rivas and  
11 Mr. Harper go in and approach one of the managers. You will  
12 hear from one of those managers, Wes Ferris. Wes Ferris  
13 talked with George Rivas. You will learn that George Rivas  
14 is very smooth in his lies and his belief. Told him that he  
15 was there to investigate possible grab-and-run thieves and  
16 wanted to know if the employees would look at some photo  
17 lineups.

18                  He was so smooth, in fact, that Wes  
19 Ferris took him to the video room to show him how the  
20 videotapes were made. And once the store was locked up, Wes  
21 Ferris made an announcement for all shoppers to come  
22 forward, that the store was now closed.

23                  At that point in time, all the employees  
24 were gathered at the front. The shoppers, all accomplices  
25 in this crime had gathered up with the employees.



1           At that time George Rivas then pulled out  
2 his .357, held it in the air and told all of the employees  
3 that this was a robbery. He told no one to resist. Told  
4 Wes Ferris not to move, that if he had to shoot one of them,  
5 he was going to kill all of them.

6           The other accomplices at that time inside  
7 the store pulled their weapons on the employees and they  
8 were told to move forward to the counter to be searched.  
9 George Rivas told them that he had someone outside watching.  
10 And during the course of that robbery they heard him  
11 communicate over the radio. That man is Patrick Murphy who  
12 informed him that the traffic was fine, that the police were  
13 tied up at a wreck on Highway 183.

14           The employees were searched at the front  
15 at that time and they were asked this question. Is there  
16 anyone out there that is here to pick you up? And you will  
17 hear from a man named Michael Simpson who told them yes.  
18 His fiance, Misty Wright, was outside.

19           Misty Wright was sitting outside in the  
20 car and she was nine months pregnant. She was out against  
21 doctor's orders. And she looked into that store at that  
22 time and saw the employees being searched and she knew  
23 something was wrong. But because of her medical condition,  
24 she didn't trust her instincts.

25           Instead of calling the police at that

1 time, she drove over to the K-Mart and called her best  
2 friend to ask her to come join her in front of the store,  
3 which she did.

4 About that same time the employees were  
5 rounded up and taken in one long line and placed back in the  
6 employee's breakroom where they were searched and tied up.  
7 Their property was taken. And they were taunted and their  
8 lives were threatened.

9 Wes Ferris left that breakroom in the  
10 company of George Rivas. He was taken to the front. He  
11 emptied out the cash registers for Mr. Rivas. He was then  
12 taken to the back office where he opened the safe for  
13 Mr. Rivas. Mr. Rivas removed \$73,000 worth of cash, three  
14 days' worth of store receipts.

15 He took the videotape tape from the  
16 videotape monitors. He took Wes Ferris' keys and told him  
17 he was going to use his car, which was a white Ford Explorer  
18 parked directly in front of that Oshman's.

19 He then was taken to the side of the  
20 store near the gun section and went to the back to unlock  
21 the gun safe where the handguns were kept. After doing that  
22 George Rivas had him go to the gun section and hand an  
23 accomplice, Mr. Newbury, the keys to unlock the long guns,  
24 the rifles and shotguns.

25 And he was then taken to the back of the

1 breakroom. The entire time Mr. Rivas is in communication  
2 with Mr. Murphy over his radio. Once Mr. Ferris is placed  
3 in that back room, he is kicked in the back of the legs,  
4 forced down to the ground, and searched. He can hear Mr.  
5 Rivas communicating over his radio. Mr. Rivas leaves, takes  
6 his keys, goes out to the front.

7 Patrick Murphy has informed him that  
8 there are people out front waiting on employees. He goes to  
9 one car and tells them they are conducting interviews about  
10 shoplifters. He then proceeds to go to Misty Wright's car,  
11 whose friend has arrived at that time. She becomes  
12 frightened and drives off. At that point in time she gets  
13 on the phone and the operator -- is calling the 911  
14 operator.

15 They watch George Rivas get into  
16 Mr. Ferris' car and drive around to the back. They report  
17 to the operator that they see suspicious activity and this  
18 is the call that Aubrey Hawkins is summoned to at the  
19 Oshman's.

20 The evidence will show that Mr. Rivas  
21 drives to the back of that Oshman's near the loading dock  
22 and asks his men to come around, come to the back, gather up  
23 the guns and the money and the other equipment. Patrick  
24 Murphy stays out front. He's still monitoring the activity.  
25 And he sees Aubrey Hawkins as he arrives at that store,

1 watches him cruise in front of the store and he immediately  
2 notifies George Rivas that a police officer is there.

3 At that point in time he stays on the  
4 radio with Mr. Rivas and monitors his activities. He  
5 watches Aubrey Hawkins cruise to the front, pick up speed,  
6 and go to the back of that Oshman's. And then Patrick  
7 Murphy does his job. He sets up an ambush. He tells them  
8 Aubrey Hawkins is coming. George Rivas tells his men, we  
9 have company, come out back. And they are waiting for  
10 Aubrey Hawkins.

11 The evidence will show that Aubrey  
12 Hawkins drives to the back of that Oshman's and pulls behind  
13 that Ford Explorer and he drives right into an ambush, an  
14 ambush that was set up by this man.

15 The witnesses will tell you that the  
16 gunfire is rapid when it begins and it's continuous. Over  
17 20 shots are fired. Officer Hawkins' car is hit from  
18 various angles. There are bullet holes on the hood of the  
19 car from the driver's side, there are four bullet holes  
20 coming from the passenger side of the front windshield, and  
21 also the front windshield on the driver's side.

22 The evidence will show that the driver's  
23 window was shot out and struck by bullets. The computer  
24 inside the car is hit by bullets. The Ford Explorer is hit  
25 by two or three bullets into the door. The trailers in the

1 back of the store are struck by bullets. Over 20 shots will  
2 be fired by five different weapons, all .357 revolvers.

3           Officer Hawkins's body will be penetrated  
4 by bullets 11 times. You will know from the evidence that  
5 he saw his attackers because he got his arm up in a  
6 defensive posture and was struck three times. He was shot  
7 in the head six times. His left eye is shot out. He's shot  
8 in the cheek and in the ear and in the throat. He's shot in  
9 the back of the shoulder and in the back a bullet which  
10 penetrates his heart and was fired at extremely close range.

11           After he is shot, his body is drug from  
12 his squad car and thrown to the ground. The vehicle goes  
13 forward at some point in time and hits the back of that Ford  
14 Explorer. One of the accomplices gets in and removes his  
15 squad car, wrecks into the back of one of the trailers in  
16 the back. The Ford Explorer then moves back, drives over  
17 Officer Hawkins' body and drags it ten feet before it then  
18 moves forward off his body.

19           In the shooting frenzy George Rivas  
20 himself is wounded twice through the fleshy part of his  
21 stomach and thigh, flesh wound, and Randy Halprin is shot in  
22 the foot. They even shoot out the Ford Explorer window.  
23 And they leave the back in a calm, cool manner.

24           The evidence will show that they  
25 continued to work as a team. In fact, by the time Officer

1 Hawkins drove behind that Ford Explorer and he is shot and  
2 murdered and his car is removed and they are leaving the  
3 back of that parking lot, 47 seconds elapsed, just 44  
4 seconds.

5 Patrick Murphy is out front. They  
6 communicate with him and say that -- George Rivas tells him  
7 he's been hurt and he's told to meet at a rendezvous point.  
8 The rendezvous point is an apartment complex directly behind  
9 the Oshman's.

10 He secures his weapons, so they can't be  
11 seen and then drives to that rendezvous point. When he gets  
12 there, the men are outside the car. He's in a Suburban,  
13 driving the Suburban, and he gets out. Then Patrick Murphy  
14 gets behind the driver's seat of the Suburban and gets out  
15 the AR-15 assault rifle.

16 And he tells you clearly what his  
17 intentions are then. He says, my purpose was if pursued by  
18 the police, I was to initiate a firefight with the AR-15,  
19 clearly demonstrating his intentions and his anticipation of  
20 violence out there that evening.

21 The items are loaded into the back of  
22 that Suburban and they take off. They make off with 44  
23 guns, ten handguns, seven shotguns, and three rifles, lots  
24 of ammunition. They leave behind one of their weapons which  
25 is traced back to the prison breakout. They leave behind a

1 walkie-talkie. They even take Officer Hawkins'  
2 semiautomatic handgun. And they leave behind Aubrey Hawkins  
3 bleeding to death in the back of that parking lot.

4 The police are summoned immediately.  
5 They arrive shortly after and there's nothing they can do  
6 for Aubrey Hawkins.

7 The evidence will show that Mr. Murphy  
8 and his accomplices then flee the state. They go to  
9 Colorado. They wind up in a small town called Woodland  
10 Park, which is located near Colorado Springs. They reside  
11 in an RV park in an RV. The cover story is they are  
12 Christian missionaries, traveling across the country.

13 The evidence will show that eventually  
14 someone in that RV park recognizes one or two of them. And  
15 they go to the Teller County Sheriff's Office and talk with  
16 Sheriff Fehn and his deputies. Other law enforcement is  
17 called in.

18 On January 22nd they set up surveillance  
19 around that RV camp. In the early morning hours around,  
20 actually 10:00 a.m., George Rivas, along with Joseph Garcia  
21 and Michael Rodriguez leave that RV park. As they stop at a  
22 convenience store, they are surrounded by a SWAT Team and  
23 arrested. They have 13 weapons in their possession,  
24 including Officer Hawkins' handgun.

25 They are taken into custody. Sheriff

1 Fehn then moves into the RV park and surrounds the RV.

2 After forty-five minutes Randy Halprin surrenders. Larry  
3 Harper is also inside the RV. He refuses to come out and  
4 eventually takes his own life.

5 A search of the RV will show many weapons  
6 taken from the Oshman's as well as other property. This is  
7 the same RV that witnesses often spotted Patrick Murphy in.  
8 Patrick Murphy and Donald Newbury are not at that RV park  
9 and are still on the loose. The police are searching for a  
10 van and believe they are in the area.

11 The evidence will show the next day that  
12 that van, in fact, is found in Colorado Springs. And that  
13 evening they are located in a Holiday Inn where there is a  
14 standoff.

15 Eventually at 3:30 in the morning they  
16 surrender to police. A search of the hotel room they were  
17 in will reveal ten guns, all taken from that Oshman's  
18 robbery.

19 After his surrender Patrick Murphy gives  
20 a nine-page confession to Detective Randall Johnson  
21 detailing his role in this offense, how they planned it, and  
22 what his intentions were.

23 The scientific evidence will show that  
24 the .357 revolvers were found inside the RV disassembled.  
25 They were reassembled and tested by a firearms expert here.



1 You will hear from that expert, Lannie Emanuel. And he will  
2 tell you that five different revolvers were used in that  
3 shooting behind the Oshman's.

4 At the close of the evidence, the  
5 evidence will be clear that Patrick Murphy is guilty of  
6 capital murder.

7 MR. SANCHEZ: We have reserved our  
8 opening statement.

9 THE COURT: Defense reserves.

10 MR. SHOOK: Would you like me at this  
11 time to bring in all available witnesses?

12 THE COURT: Bring in all available  
13 witnesses, so I can swear them.

14 [At this time all witnesses  
15 available were sworn by the Court.]

16 THE COURT: Will the Rule of evidence be  
17 invoked?

18 MS. BUSBEE: We will invoke the Rule,  
19 Your Honor.

20 THE COURT: You understand the Rule is  
21 you may not discuss your testimony with anyone other than  
22 the attorneys who are trying this case. If you need to  
23 discuss your testimony, be sure and do so in a room where no  
24 one else can hear you. Any questions? No questions. Who  
25 will the State call first?

1 MR. SHOOK: We'll call Jayne Hawkins.

2 JAYNE HAWKINS,

3 having been duly sworn, was examined and testified as  
4 follows:

5 DIRECT EXAMINATION

6 BY MR. SHOOK:

7 Q. Would you tell us your name, please.

8 A. Jayne Hawkins.

9 Q. Ms. Hawkins, are you the mother of Aubrey  
10 Hawkins?

11 A. Yes.

12 Q. Is Aubrey Hawkins or was Aubrey Hawkins your  
13 only child?

14 A. Yes.

15 Q. Could you tell the jury how old Aubrey Hawkins  
16 was at the time of his murder?

17 A. Twenty-nine.

18 Q. Was he born and raised here in Dallas?

19 A. Yes.

20 Q. And did he have a family?

21 A. Sorry. Yes. His -- Andrew is almost 12 now.  
22 He was nine at the time.

23 Q. That was his son?

24 A. Yes.

25 Q. Okay. And was he married at the time?

1 A. Yes.

2 Q. And his wife's name is Lori Hawkins?

3 A. Lori, uh-huh.

4 Q. Did his son Andrew live with him?

5 A. No. Andrew lived with his mom one street  
6 over. Aubrey moved about a block away from Andrew.

7 Q. Okay. And how was your son employed?

8 A. Aubrey was a police officer with the Irving  
9 Police Department.

10 Q. Do you recall how long he had had that job?

11 A. No, I don't know, fourteen months, something.

12 Q. Had he worked with other police agencies prior  
13 to that?

14 A. Yes.

15 Q. Which agencies were those?

16 A. He was with Kaufman. He was with Harris  
17 Medical. He was with Saint Paul.

18 Q. Okay. And did your son enjoy being a police  
19 officer?

20 A. Oh, yes, yes. He achieved his dream. That's  
21 what he always wanted to do was be with a big police  
22 department.

23 Q. Okay. Let me turn your attention to Christmas  
24 Eve of 2000 and ask if you had plans with your son that  
25 evening?

1 A. I'm sorry. I don't know. I'm so tired of  
2 this.

3 MS. BUSBEE: Can we have a break?

4 A. Okay. I'm ready now. Please go ahead.

5 Q. (By Mr. Shook) Had you made some plans with  
6 your son?

7 A. Yes. My mom had called, Aubrey's grandmother,  
8 and said that she was coming in for Christmas. So I told  
9 Aubrey and we had never had dinner when he was on duty  
10 before. So -- but he said he wanted to have Christmas Eve  
11 dinner, so it was really a treat for us. And so we made  
12 plans to meet at a restaurant on 183.

13 Q. Which restaurant was that?

14 A. Lori chose the Olive Garden.

15 Q. And what time did you arrive there at the  
16 restaurant?

17 A. I picked my mom up at the airport. The plane  
18 was late and I guess we got there maybe about ten to 6:00,  
19 something like that. We were late because of the plane.

20 Q. How old was your mother at that time?

21 A. Ninety-two.

22 Q. And then, so you met your son there, Aubrey,  
23 along with his wife?

24 A. Yes. We walked in and Andrew was sitting next  
25 to his dad and then Lori was there. She picked Andrew up

1 from his mom's house.

2 Q. Was your son on duty at that time?

3 A. Yes.

4 Q. Was he in his police uniform?

5 A. Yes.

6 Q. Okay. And did the dinner go well?

7 A. Oh, yes. We just had normal kinds of  
8 conversation, you know, and he looked particularly handsome  
9 that night. I told him and it embarrassed him. It was only  
10 the second time that I had seen him in his uniform. The  
11 only other time was when he graduated from the academy.

12 Q. Was his state of mind well at that time?

13 A. His state of mind was wonderful. He was there  
14 with Lori and Andrew and he had just had his checkup and he  
15 said that his triglycerides were down and he --

16 MR. SANCHEZ: I have to object to  
17 nonresponsive.

18 A. Was healthy and felt good.

19 THE COURT: Sustained. Wait for the next  
20 question.

21 Q. (By Mr. Shook) Around 6:25 or 6:20, did your  
22 son have to leave?

23 A. The radio started going off and I couldn't  
24 hear it, but he would look down and listen, I guess, and  
25 click it off and then it probably rang about three times.

1 And he looked across the table at me and he said, "Mom, I  
2 have to go."

3 And so, you know, I got the waitress over  
4 and paid the check and we all walked to the parking lot.

5 Q. Okay. And once you went to the parking lot,  
6 did he eventually go to his car?

7 A. I'm sorry?

8 Q. Did he make it to -- did you see him get in  
9 his patrol car?

10 A. Yes. First he scooped up Andrew and then said  
11 goodbye to Lori and put them in the car and they went away.  
12 And then he said bye to my mom and he said, "I'll see you in  
13 the morning, Mom, I love you." And I said, "I love you.  
14 See you in the morning." And those were his last words.

15 And then I got -- and then he put me in  
16 the car and he motioned like this for me to follow him  
17 because he didn't think I knew Irving very well, which I  
18 didn't, quite frankly. So he got in his car and turned  
19 right on 183 and then we stopped at Esters and then we  
20 turned left and went over the overpass and then I followed  
21 behind him on the service road and then I sped up to get  
22 onto the freeway. So for a moment or two we were side by  
23 side and we just (demonstrating), you know, waved like that.

24 Q. All right.

25 MR. SHOOK: May I approach the witness,

1 Your Honor?

2 THE COURT: You may.

3 Q. (By Mr. Shook) I want to show you a  
4 photograph that's been marked State Exhibit 8. Does that  
5 show the Olive Garden Restaurant and the highway you last  
6 saw your son driving that day?

7 A. Yes.

8 MR. SHOOK: We'll offer State Exhibit 8  
9 at this time.

10 MR. SANCHEZ: No objection, Your Honor.

11 THE COURT: State's 8 shall be admitted.

12 Q. (By Mr. Shook) Ms. Hawkins, I want to turn  
13 your attention so the jury can see on the monitor, the Olive  
14 Garden is located actually in this area; is that right?

15 A. Yes.

16 Q. And this is Highway 183?

17 A. Uh-huh.

18 Q. And this would be the Oshman's store here on  
19 the other side of the highway. Now, later that evening did  
20 you return with your grandmother to your home here in  
21 Dallas?

22 A. Yes. Well, first we went to Eatsies. Andrew  
23 wanted cream brulee for dessert and Aubrey wanted chocolate  
24 eclair, so that's where I went to buy it for Christmas  
25 dinner. And then mother and I went home and put on our

1 gowns. And we decided to open our gifts to one another  
2 because I had so many presents to take to Aubrey and Lori's.

3 And so we opened our gifts and then I put  
4 the presents from under the tree in shopping bags and put  
5 them in front of the door, actually, and so they would be  
6 ready to go in the morning because I wanted to get up and  
7 get out and get over there as early as I could. So --

8 Q. Did sometime after that, did, in fact, Chief  
9 Cannaday from the Irving Police Department come to your  
10 home?

11 A. Yeah. I live in a high-rise building and the  
12 doorman called upstairs and said there is somebody down here  
13 flashing a badge and some woman named Rose. And I said, oh,  
14 FC, don't let people up here like that. I hadn't connected  
15 it at all.

16 Q. Did they come?

17 A. So then they rang -- they must have already  
18 been on the elevator because the doorbell rang almost before  
19 I could hang up the telephone. And I leaned over those  
20 packages and looked through the peephole and I saw a  
21 chaplain and a uniformed officer and Chief Cannaday who I  
22 had met once at Aubrey's graduation and Rose, who turned out  
23 to be Chief Cannaday's wife, a woman, you know.

24 Q. And at that time they informed you --

25 A. No. I said -- through the door I said, has



1 something happened to Aubrey? And actually they yelled as I  
2 remember and said, well, if you will open the door, we'll  
3 tell you. And then they walked in and I don't know what  
4 they said. I just knew he was gone.

5 Q. I want to show you what has been marked State  
6 Exhibit 6. Is this your son, how he appeared in his  
7 uniform?

8 A. Yes.

9 Q. And also State Exhibit 7, is this a photograph  
10 of your son with his son, Andrew?

11 A. Yes, that's Aubrey and Andrew.

12 MR. SHOOK: Your Honor, at this time we  
13 offer State Exhibit 6 and 7.

14 MR. SANCHEZ: No objection, Your Honor.

15 THE COURT: State's 6 and 7 shall be  
16 admitted.

17 MR. SHOOK: Pass the witness.

18 CROSS-EXAMINATION

19 BY MR. SANCHEZ:

20 Q. Ms. Hawkins, I'm going to ask you a few  
21 questions. If you don't understand something, just let me  
22 know, okay?

23 A. Okay.

24 Q. And I'll phrase it the right way. Just let me  
25 know, okay?

1 A. Okay.

2 Q. When you were at the Olive Garden, was Aubrey  
3 receiving lots of calls or you indicated that he had been  
4 looking down at his --

5 A. They were annoying, I will say that. So there  
6 were enough of them to be very distracting for him. I would  
7 say maybe four, three or four. I can't say truthfully. I  
8 don't know.

9 Q. Were those on his radio that he was carrying  
10 with him?

11 A. Yes.

12 Q. And would he answer them or would he just look  
13 down?

14 A. No, it seemed he would just look down and then  
15 like listen a bit and then click it.

16 Q. And that was happening throughout the dinner?

17 A. No, not throughout, no, just toward the very  
18 end when we were about to finish.

19 Q. When those calls started, how long had you  
20 been at the Olive Garden?

21 A. I don't know. I mean, gosh, we got there at  
22 ten to 6:00 and left at 6:30 or so.

23 Q. So it wasn't very long?

24 A. It wasn't very long.

25 Q. When he received the last call, did he seem in

1 a hurry to get out of there or sounds to me like you took  
2 your time to get out --

3 A. No, we didn't really take our time. It wasn't  
4 as though we was in a hurry, but we didn't take our time,  
5 either. I have no idea if it was that call that came. I  
6 don't know.

7 Q. Do you know if some of those calls were to  
8 just check up on him to get him back on duty or you have no  
9 idea.

10 A. I don't -- I haven't the vaguest idea. He  
11 just simply said to me, "Mom, I've got to go." I mean, it  
12 got to the point where he had to, I guess, go to work.

13 Q. But it wasn't the type of situation where he  
14 had to jump up and let you pay and leave you behind,  
15 correct?

16 A. Well, it was we needed to go, but it wasn't --  
17 he wasn't -- Aubrey was never going to alarm me, ever,  
18 because I always worried about his safety. So he was not  
19 going to do that.

20 Q. So he got this call and he was able to help  
21 you to your car?

22 A. Well, yes, yes, I mean.

23 Q. And you didn't run over there, at least you  
24 walked over there, correct?

25 A. Well, yes, uh-huh.

1 MR. SANCHEZ: That's all I have, Your  
2 Honor, I pass the witness.

3 REDIRECT EXAMINATION

4 BY MR. SHOOK:

5 Q. Ms. Hawkins, you don't know if he was being  
6 called to the Oshman's at that point in time or not, do you?

7 A. No, I don't.

8 MR. SHOOK: That's all we have, Judge.

9 THE COURT: Thank you, ma'am.

10 MR. SHOOK: May this witness be excused?

11 MS. BUSBEE: Your Honor, subject to our  
12 previous objections to which the Court is aware, we would  
13 like to hold that decision off for a moment.

14 THE COURT: Not at this time.

15 MR. SHOOK: We'll call Wes Ferris.

16 THE COURT: Let the record reflect this  
17 witness has been sworn.

18 WES FERRIS,  
19 having been duly sworn, was examined and testified as  
20 follows:

21 DIRECT EXAMINATION

22 BY MR. SHOOK:

23 Q. Tell us your name and spell your last name for  
24 the Court Reporter, please.

25 A. Wesley Ferris, F-E-R-R-I-S.

1 Q. And how are you employed, sir?

2 A. Currently employed with Dotson Grand Rental  
3 Station in Burleson, Texas.

4 Q. Do you have a family?

5 A. Yes, I do, wife, six children, and three  
6 grandchildren.

7 Q. Now, prior to your current job, where were you  
8 working?

9 A. Oshman's Sporting Goods in Irving, Texas.

10 Q. And prior to working -- how long had you  
11 worked at Oshman's?

12 A. Just over six years.

13 Q. Prior to that working for Oshman's, how were  
14 you employed?

15 A. I was in the United States Marine Corps for 20  
16 years.

17 Q. What was your rank there?

18 A. I retired as a gunnery sergeant.

19 Q. Let me turn your attention back to December  
20 24th of 2000. At that time you were employed with Oshman's;  
21 is that right?

22 A. Yes, sir, I was.

23 Q. And what did you do with Oshman's?

24 A. I was the department manager for the field and  
25 stream department at the Oshman's Super Sports store in

1 Irving, Texas.

2 Q. Let me show you, if you direct your attention  
3 to the monitor, you see Highway 183 up here on the monitor?  
4 Can we see that the Oshman's Superstore is located up here  
5 in the top left-hand corner?

6 A. Yes, sir, it is.

7 Q. How long had you worked at that Oshman's store  
8 back on December 24th of 2000?

9 A. I had been there for three years.

10 Q. And were you scheduled to work there on  
11 Christmas Eve?

12 A. Yes, sir, I was.

13 Q. About what time did you arrive?

14 A. I arrived there about 6:30 in the morning.

15 Q. What time was Oshman's going to close that  
16 evening?

17 A. We were scheduled to close at 6:00 p.m.

18 Q. You were there during the course of the entire  
19 day, I take it?

20 A. Yes, sir, I was.

21 Q. Was it a busy shopping day for you?

22 A. Yes, sir, it was at the beginning of the day,  
23 but it kind of slacked off during the afternoon period.

24 Q. Okay. Did you have a lot of employees  
25 scheduled to work that evening?

1           A.       When we opened that morning, we had 22  
2 employees scheduled to work that day, but by the  
3 midafternoon we had let all but 16 go home.

4           Q.       Okay. Were there other managers on duty with  
5 you also at that time?

6           A.       Yes. There were three other managers there.

7           Q.       First let me show you what has been marked as  
8 State Exhibit 43. Is that a diagram of the Oshman's store?

9           A.       Yes, sir, it is.

10          Q.       And is it how the store was laid out on  
11 December 24th of 2000?

12          A.       Yes, sir.

13          Q.       Would it help you explain your testimony to  
14 the jury?

15          A.       Yes, it would.

16                   MR. SHOOK: Your Honor, at this time  
17 we'll offer State Exhibit 43.

18                   MR. SANCHEZ: No objection, Your Honor.

19                   THE COURT: No. 43 shall be admitted.

20          Q.       (By Mr. Shook) Let me show you what has been  
21 marked State Exhibit 755. Is this a list of the names of  
22 managers and sales associates that you had working that  
23 evening at closing time?

24          A.       Yes, sir, it is.

25                   MR. SHOOK: Your Honor, at this time we

1 offer State Exhibit 755.

2 MR. SANCHEZ: No objection, Your Honor.

3 THE COURT: No. 755 shall be admitted.

4 Q. (By Mr. Shook) Let me show the jury 755. At  
5 the top we have managers listed with your name as well as  
6 three others; is that right?

7 A. Yes, sir.

8 Q. Were those the managers on duty that evening?

9 A. Yes, sir.

10 Q. And then the sales associates, are those all  
11 the folks that worked the different sections of the store?

12 A. Yes, sir.

13 Q. As far as the sales associates go, what's the  
14 average age of these employees?

15 A. About 18 years old.

16 Q. Some of them still in high school?

17 A. Yes, sir.

18 Q. Are they pretty much part-time employees?

19 A. Yes, sir.

20 MR. SHOOK: Your Honor, could I have the  
21 witness step down for a moment?

22 THE COURT: You may.

23 Q. (By Mr. Shook) Mr. Ferris, if you could come  
24 over here and I want to go over this diagram with the jury.  
25 I'll caution you to try not to block the view of the jurors.



1 But does that diagram show the general layout of the  
2 Oshman's store?

3 A. At that time, yes, sir.

4 Q. Starting with the top, can you point to the  
5 jury and show them where the entrance was?

6 A. The entrance was right here. This is the only  
7 entrance to the building.

8 Q. Okay. Now, does this particular store have a  
9 lot of windows in the front?

10 A. Only right here at the entrance and exit  
11 doors.

12 Q. So if you are going to look into the building,  
13 the only way you would be able to do that is look through  
14 the entry or exit doors?

15 A. Yes, sir.

16 Q. As you come into the store, where are the cash  
17 registers located?

18 A. There's three cash registers located up here  
19 and two up here at customer service.

20 Q. And what is the customer service counter for?

21 A. Customer service is where customers go up to  
22 check out and also when they have returns, they bring the  
23 returns to the customer service counter and the associates  
24 behind the counter give the return.

25 Q. Is there an intercom there that allows you to

1 make announcements throughout the store?

2 A. Yes, sir, there is. It's right next to this  
3 register.

4 Q. Now, if you would, just kind of starting, I  
5 guess, if we're facing the diagram, looking at the left,  
6 describe how the store is laid out.

7 A. This area here is the shoe department. From  
8 the front of the store to the back of the store was the  
9 self-service shoe department. We have shoes out on the  
10 floor where customers can try them on. There were  
11 associates there to assist, if there were any questions that  
12 needed answered.

13 From there we went back here was the  
14 exercise and athletic department. The exercise mat where we  
15 had displays of treadmills, weight benches, and any other  
16 exercise equipment that we sold. We went to these aisles  
17 where we had the athletic bags, baseball, football, soccer,  
18 basketball. And this was the display area where we have the  
19 displays of the basketball systems that we sold.

20 Further down was the bike department area  
21 where we sold bicycles. And we get down to this corner over  
22 here, it's the golf and tennis departments where we sell  
23 golf sets, the tennis rackets, restrung tennis rackets.

24 Moving on the right side here is the  
25 field and stream department which was hunting, fishing,

1 camping, and sold firearms and ammunition, tents, camping  
2 supplies, fishing licenses, and lures and reels.

3 And in this area in the center was the  
4 apparel lots where at the time it was men's, children's, and  
5 women's departments.

6 Q. Now, you were over the, actually, the field  
7 and stream department; is that right?

8 A. Yes, sir, I was.

9 Q. Oshman's did sell handguns, shotguns, and  
10 rifles?

11 A. Yes, sir, we did.

12 Q. When the handguns were not out in the display  
13 case, where were they kept?

14 A. They were -- during the day they were kept in  
15 the display cases right here. At night we took them out of  
16 the display cases and took them into the gunroom and locked  
17 them in a safe back in the corner.

18 Q. And the rifles and shotguns, did they stay out  
19 here in the display area?

20 A. They were on a wall, on a rack on the wall  
21 behind the gun counter.

22 Q. Now, this area in here, this office area, what  
23 are these?

24 A. The first one here is the general manager's  
25 office. This is our video room where we kept the

1 surveillance cameras for the store. And this was the cash  
2 office and supply room and this is the assistant general  
3 manager's office.

4 Q. Was the safe where you kept the store's money  
5 located back here?

6 A. Yes, sir, in the cash office.

7 Q. As far as cameras and videotapes going, how  
8 many were operating that evening?

9 A. They were all operating that evening. Only  
10 one was actually recording.

11 Q. Which one was recording?

12 A. The one that was recording was the one right  
13 here on the entrance and exit doors.

14 Q. Okay. Then in the back, what do we see here  
15 down here in the back part of the store?

16 A. Down here in this corner there's an entryway  
17 here and that's a hallway back here that goes back to the  
18 restrooms for the public and for the employees. And there's  
19 a door here that led back into the employee breakroom.  
20 There were also offices back there for the regional  
21 vice-president and regional loss prevention officer.

22 Q. So the employees' breakroom is the very back  
23 right-hand corner?

24 A. Yes, sir, it is.

25 Q. And then this area here, is this the back of

1 the store?

2 A. This is the back parking area where the trucks  
3 arrive to deliver our freight and we store it in this  
4 warehouse right here.

5 Q. There were several exit doors that led out to  
6 this back loading dock area?

7 A. Yes, there were.

8 Q. And were there trailers out there at the time  
9 in the back area?

10 A. Yes, sir. There was one backed up against  
11 this door here and a couple parked out here in the parking  
12 lot.

13 Q. You can go ahead and have a seat. Mr. Ferris,  
14 let me show you some photographs that have been marked State  
15 Exhibits 9 through 38. Are these photographs of the -- some  
16 aerial views of the Oshman's, as well as some interior shots  
17 of the Oshman's and how the store appeared back on December  
18 24th of 2000?

19 A. Yes, they are.

20 MR. SHOOK: Your Honor, at this time we  
21 will offer State Exhibit 9 through 38.

22 MR. SANCHEZ: Assuming these are the ones  
23 that we've already seen, we have no objection.

24 THE COURT: Nos. 9 through 38 shall be  
25 admitted.

1 Q. (By Mr. Shook) Also, let me show you two  
2 photographs which have been marked State Exhibits 49 and 50.  
3 Are these photographs of the vehicle, your Ford Explorer,  
4 that you drove to work that day?

5 A. Yes, sir, it is.

6 MR. SHOOK: We'll offer State Exhibit 49  
7 and 50.

8 MR. SANCHEZ: Again, Your Honor, we have  
9 no objection.

10 THE COURT: Nos. 49 and 50 shall be  
11 admitted.

12 Q. (By Mr. Shook) Mr. Ferris, directing your  
13 attention to the monitor, is this an overview of the parking  
14 lot area for the Oshman's there where it's located right off  
15 Highway 183?

16 A. Yes, sir, it is.

17 Q. And then in particular is this the Oshman's  
18 located right here?

19 A. Yes, sir.

20 Q. What other types of shops were located in this  
21 shopping center?

22 A. Down on the far left right there next over  
23 there was K-Mart and that's Hobby Lobby.

24 Q. Okay. What about these buildings here?

25 A. There's a Staples and Comp USA over there on

1 that side.

2 Q. And this parking lot behind the Oshman's, what  
3 type of business is that?

4 A. It's an automobile dealership.

5 Q. Okay. And then directly behind the Oshman's  
6 on the other side is a field; is that right?

7 A. Yes, sir, it is.

8 Q. And then is this a group of apartments across  
9 that field?

10 A. Yes, sir.

11 Q. This is a little closer photograph of the  
12 Oshman's. Was this the parking lot which you parked your  
13 Ford Explorer in that evening?

14 A. Yes, sir, it is.

15 Q. Approximately where did you park your car?

16 A. At closing time my vehicle was parked right --  
17 just right there in that area right there by the light pole.

18 Q. All right. Again, this is a closer shot of  
19 the front. Is this the entrance and exit doors for the  
20 Oshman's?

21 A. Yes, sir, it is.

22 Q. And if you were going to look into the  
23 Oshman's, this would be the only area that you could do  
24 that?

25 A. Yes, sir.

1 Q. Looking at State Exhibit 12, does this show  
2 the back of the Oshman's?

3 A. Yes, sir, it does.

4 Q. What area are we seeing right here?

5 A. That's the back parking area out behind the  
6 receiving by the receiving bay of the store.

7 Q. Are there some exit doors that are located in  
8 this area and this area?

9 A. Yes, sir. There's one right there in the  
10 corner where your beam is pointed right now and that's one  
11 just down from there.

12 Q. And you told the jury there were some trailers  
13 back there at that time. Is this the trailer that was  
14 backed up to the warehouse?

15 A. Yes, sir.

16 Q. As well as two other trailers here?

17 A. Yes, sir.

18 Q. If you were to reach this back area, is it  
19 possible to drive around the Oshman's from this direction  
20 and come to the back?

21 A. Yes, sir.

22 Q. And then, again, what we're seeing here is the  
23 back part of the car lot?

24 A. Yes, sir.

25 Q. Now, I want to show you what's been marked as



1 State Exhibit 13. Is this a photograph of the inside area  
2 of the Oshman's?

3 A. Yes, sir, it is.

4 Q. What part of the store are we looking at  
5 there?

6 A. That's taken right there in front of the  
7 exercise mat, looking down to the north end of the store.

8 Q. Okay. I want to turn your attention to --  
9 well, let me first start around 5:30 that night, did Darrin  
10 Ojeda, one of the other managers, make an announcement?

11 A. Yes, sir. He did. He made an announcement  
12 from the phone up there at customer service that it was 5:30  
13 and that Oshman's would be closing in 30 minutes. He  
14 thanked everyone for shopping at Oshman's and asked the  
15 customers to make their final selections and make their way  
16 to the front of the store to check out.

17 Q. Were there many shoppers in the store at that  
18 time?

19 A. I didn't have an idea of how many were there  
20 and I decided to walk the store after he made that  
21 announcement.

22 Q. And as you walked the store, what did you  
23 observe?

24 A. I noticed there were a few customers there.  
25 As I walked the store I was walking to make sure the

1 customers were being taken care of and to direct any  
2 associates that weren't helping customers to start getting a  
3 good recovery of the store so we could get out of the store  
4 as close to 6:00 as possible.

5 Q. What part of the store did you notice  
6 customers in?

7 A. There were some in the shoe department, some  
8 back by the exercise department, and some in the clothing  
9 department.

10 Q. Do you recall what they looked like at that  
11 time?

12 A. No, sir, I don't.

13 Q. Did you have any conversations with them at  
14 that time?

15 A. No, sir, I did not.

16 Q. Around 5:45 p.m. did you go over to the  
17 section where the guns were sold, the field and stream  
18 section?

19 A. Yes, sir. When I got back over there, there  
20 was nobody over in there -- no customers in that area, so I  
21 told the two employees back there to go ahead and put the  
22 guns away. While they put the guns away, I would close the  
23 register and count the money.

24 Q. And when you talk about the guns, you are  
25 talking about the handguns?

1 A. Yes, sir.

2 Q. They are placed in that gun safe?

3 A. Yes, sir.

4 Q. Did you close out the register at that time?

5 A. Yes, sir. While they were putting the guns  
6 away, I closed out the register and counted the money down.

7 Q. Where did you go then?

8 A. I started back to the front of the store to  
9 put the money in the safe.

10 Q. Okay. Did you make it to the safe at that  
11 time?

12 A. No, sir, I did not. On my way up to the  
13 front, I received a page that I was needed at the exercise  
14 mat.

15 Q. Okay. Did you go to the exercise mat area at  
16 that time?

17 A. I went to customer service and put the money  
18 in a bin that we had behind customer service to -- that we  
19 put the drawers in to wheel them all back to the office at  
20 the same time. And I received another page to go to the  
21 exercise mat and I walked back to the exercise mat from  
22 there.

23 Q. And this is the exercise mat area, what we see  
24 here on the monitor, right?

25 A. Just off to the right of there, yes, sir.

1 Q. Now, when you arrived at the exercise mat, who  
2 was there?

3 A. Tim Moore, the department manager for the  
4 athletic department, was standing there talking to a  
5 gentleman.

6 Q. And how was that person dressed?

7 A. He was well dressed. He was wearing dress  
8 shoes, black slacks, a light color, either white or light  
9 blue shirt. He was wearing a windbreaker-type jacket and he  
10 had a ballcap on that said ADT on it.

11 Q. And what is ADT?

12 A. ADT is an alarm company that we used at the  
13 store to monitor our store after we set the alarm in the  
14 evenings.

15 Q. Did you enter into a conversation with him at  
16 that time?

17 A. Yes, sir, I did.

18 Q. Now, did you later come to know this man by  
19 the name of George Rivas?

20 A. Yes, sir, I did.

21 Q. If you could look -- let me direct your  
22 attention to the display of photographs right over your  
23 shoulder; which I believe is marked State Exhibit 44. Do  
24 you see Mr. Rivas' photograph on that poster?

25 A. Yes, sir. He's on the top all the way over on

1 the left side.

2 Q. Do you see other men on that poster which were  
3 also involved in the robbery there of the Oshman's?

4 A. Yes, sir.

5 MR. SHOOK: Your Honor, at this time we  
6 offer State Exhibit 44.

7 MR. SANCHEZ: No objection, Your Honor.

8 THE COURT: No. 44 shall be admitted.

9 Q. (By Mr. Shook) So the first person you  
10 encountered was Mr. Rivas up there in the top left-hand  
11 corner and he was dressed as a security guard at that time?

12 A. Yes, sir.

13 Q. Did he look a little different than he did in  
14 the poster there?

15 A. Yes, sir, he did.

16 Q. How -- how did his face or hair look  
17 different?

18 A. He didn't have no facial hair and he had dark  
19 hair and wore glasses similar to mine.

20 Q. And what did Mr. Rivas ask of you at that  
21 time?

22 A. He said he and his partner --

23 MR. SANCHEZ: I'll object to hearsay.

24 THE COURT: Overruled.

25 A. He said he and his partner had been to -- they

1 had been investigating a grab-and-run ring that had been  
2 operating in the area and he asked if I could have the  
3 employees look at some photographs that he had.

4 Q. (By Mr. Shook) Okay. What's a grab-and-run  
5 gang?

6 A. It's a group of individuals that are working  
7 together. They enter the store. Several of them enter the  
8 store and they will grab some merchandise and run out one of  
9 the exits without paying for it.

10 Q. And did he, in fact, have some photographs?

11 A. Yes, sir, he did. He had an eight-by-ten  
12 sheet of paper with six photographs on it.

13 Q. What did you tell him?

14 A. I told him I didn't have any objections to it.  
15 And there were two employees there in the area, Sandra  
16 Rodriguez and Tony Coronado, and I called them over and had  
17 them look at the photographs.

18 Q. Did you see any other men dressed as security  
19 guards at that time?

20 A. No, sir, I did not.

21 Q. After Sandra Rodriguez and Tony Coronado  
22 looked at the photographs, what happened then?

23 A. Sandra identified that she thought at least  
24 two of those individuals had been in the store earlier that  
25 day. Mr. Rivas asked if we had a video system and I told

1 him we did. And he asked if he could look at the videotape.

2 Q. What was Mr. Rivas' demeanor like at that  
3 time?

4 A. It was calm, well composed. Didn't --

5 Q. Didn't arouse your suspicions in any way?

6 A. No, sir.

7 Q. Did, in fact, you take him back to the video  
8 room at that time?

9 A. Yes, sir, I did. I asked Sandra to come with  
10 us and we went up to the video room.

11 Q. Once you went to the video room, which I  
12 believe we see in the next photograph, State Exhibit 14; is  
13 that right?

14 A. Yes, sir.

15 Q. And that's located up towards the front  
16 offices of the store?

17 A. Yes, sir, it is.

18 Q. What did you do once you came into the video  
19 room?

20 A. I sat down at the chair at the desk there and  
21 I stopped the video from recording and I asked Sandra about  
22 what time she saw the individuals in the store. Then I  
23 looked at the monitor and saw that the only camera recording  
24 was the entrance and exit doors. And I told Mr. Rivas that  
25 and he said it wouldn't do him any good, but thanked me

1 anyway.

2 Q. Did you then leave the video room with  
3 Mr. Rivas at that time?

4 A. We left the room. I closed the door and I  
5 went up to the customer service area.

6 Q. Approximately what time was it at that point?

7 A. It was pretty close to 6:00.

8 Q. Did Mr. Rivas join you in the customer service  
9 area?

10 A. Yes, sir, he did.

11 Q. State Exhibit 15, does this show the customer  
12 service area?

13 A. Yes, sir, it is.

14 Q. It's at this counter here against the wall?

15 A. Yes, sir.

16 Q. And are these the actual checkout counters,  
17 the three checkout counters, that are near the service area?

18 A. Yes, sir.

19 Q. Once you went to that service counter area,  
20 what was going on at that time?

21 A. Most of the employees had moved up front and  
22 they were talking to another gentleman who was dressed as a  
23 security guard. I didn't get involved in any conversations  
24 with him. They were at the register 4 and he had some  
25 copies of the photographs on eight-by-ten sheets of paper



1 laying there and they were talking about those.

2 Q. Did they appear to be looking at the  
3 photographs?

4 A. Looking at the photographs and talking to him,  
5 yes, sir.

6 Q. Okay. And most of the employees were gathered  
7 up there at that time; is that right?

8 A. Yes, sir.

9 Q. Did you see any shoppers around at that time?

10 A. No, sir, I did not.

11 Q. What did you do then?

12 A. I looked at my watch and it was just after  
13 6:00. I picked up the phone at customer service and I made  
14 a PA announcement that it was 6:00, Oshman's was now closed.  
15 Thanked everybody again for shopping with Oshman's and asked  
16 any customer still in the store to make their final  
17 selections and please come to the front to check out.

18 Q. Was Mr. Rivas near you when you made that  
19 announcement?

20 A. He had moved -- I believe he had moved over to  
21 -- as I was facing customer service, he moved over to the  
22 right there back by that case.

23 Q. Okay. This area here?

24 A. Yes, sir.

25 Q. And where were you standing?

1 A. I was standing just by that register on this  
2 side of the counter.

3 Q. So y'all were very close to one another at  
4 that time?

5 A. No more than five feet apart, yes, sir.

6 Q. Once you made that announcement, what's the  
7 next thing that happened?

8 A. I turned around to face the store to see if  
9 any customers had come up and to direct them to an open  
10 register so they could check out.

11 Q. Then what happened?

12 A. While I was facing that way, Mr. Rivas said,  
13 "Listen, everybody, this is a robbery."

14 Q. Did he say that in a loud, clear voice?

15 A. He said it in a loud enough voice for  
16 everybody up in that area to hear it, yes, sir.

17 Q. Did it get everyone's attention?

18 A. Yes, sir, it did.

19 Q. When you turned around, what was Mr. Rivas  
20 doing?

21 A. I turned around. He had a gun. He had it in  
22 the air, facing -- pointing toward the ceiling. And he  
23 said, "Everybody does what they are told, everybody will go  
24 home all right."

25 Q. What did you think when you saw him out with

1 that gun, making those types of statements?

2 A. At first I just thought he was trying to show  
3 us how easy it would happen. I didn't really believe it was  
4 a robbery at that time.

5 Q. Then what happened?

6 A. I made a step toward him. He dropped the gun  
7 and pointed it directly at my chest and said, "Don't try it,  
8 Wes. If you do, I'll have to shoot you. If I shoot you,  
9 I'll have to shoot everybody."

10 Q. Did you know he was serious at that point in  
11 time?

12 A. At that point I knew he was serious and I  
13 stopped and said that I wasn't going to do anything.

14 Q. What type of weapon was he pointing at you?

15 A. He was holding a Smith & Wesson .357 Magnum  
16 revolver.

17 Q. After he made that threat to you, what's the  
18 next thing that he said?

19 A. He told the employees behind customer service  
20 to get out from behind the counter and told everybody to put  
21 their hands on the counter in front of us.

22 Q. And did they comply with that?

23 A. Yes, sir, they did.

24 Q. Did you see any of the shoppers at that point  
25 in time?

1           A.       He told us that all the customers were with  
2 him. And I stepped and I turned and I looked back over my  
3 shoulder and I saw, I believe, six to eight men standing  
4 there and they were all armed.

5           Q.       Did they have guns out?

6           A.       Yes, sir, they did.

7           Q.       What type of guns did they have?

8           A.       At that time, getting just a quick glance, I  
9 believe some of them were armed with revolvers and some with  
10 semiautomatics.

11          Q.       Let me show you the diagram quickly. If you  
12 could, show the jury where the employees were gathered up  
13 and where these men with guns were gathered in the store.

14          A.       All the employees were standing along this  
15 counter with our hands on the counter in front of us. Mr.  
16 Rivas was over in this area and the rest of them were behind  
17 us in a semicircle.

18          Q.       And they had their guns out?

19          A.       And they had their guns out, yes, sir.

20          Q.       And you had originally talked to Mr. Rivas in  
21 this area?

22          A.       Back here, yes.

23          Q.       As the employees moved forward, could you tell  
24 -- did Mr. Rivas ever mention the fact that there were  
25 people outside?

1 A. Yes, sir, he did. He said all the customers  
2 were with him and there were others outside.

3 Q. Did you, in fact, hear him communicate with  
4 someone over a radio?

5 A. Yes, sir. He said over the radio he was  
6 carrying, he asked if everything was okay outside and  
7 somebody responded saying everything was fine, the police  
8 were involved with an accident on 183.

9 Q. You could actually hear them communicating  
10 through radio?

11 A. Yes, sir.

12 Q. Could you see what type of radio it was?

13 A. It was a little FRS radio that you can buy at  
14 any supermarket or Wal-Mart. We sold them there at  
15 Oshman's.

16 Q. Okay. Let me show you two photographs which  
17 have been marked State Exhibit 39 and 40. Does 39, does  
18 that look like the type of gun that George Rivas had pointed  
19 at you?

20 A. Yes, sir.

21 Q. And State Exhibit 40, is that the type of  
22 radio that was being used?

23 A. Yes.

24 MR. SHOOK: We'll offer State Exhibits 39  
25 and 40.

1 MR. SANCHEZ: No objection, Your Honor.

2 THE COURT: Nos. 39 and 40 shall be  
3 admitted.

4 Q. (By Mr. Shook) On the monitor is a photograph  
5 of a .357 revolver; is that correct?

6 A. Yes, sir.

7 Q. That's the same type of weapon George Rivas  
8 had pointed at you at that time?

9 A. Yes, sir.

10 Q. And then State Exhibit 40, shows a radio. Is  
11 this the type of radio he was communicating with?

12 A. Yes, sir, it is.

13 Q. As the employees gathered up there at the  
14 service counter area, what happened at that point in time?

15 A. They were going through -- several of the men  
16 were going through our pockets and taking anything that they  
17 considered might be used as a weapon. Several of the  
18 employees, including me, had pocket knives or multipurpose  
19 tools. And I heard one of the men say, "Oh, we've got a bad  
20 boy. Looks like he wants to try something. Go ahead and  
21 try something. I want you to try something."

22 Q. Did you look at that individual at that time?

23 A. I stepped back and I looked down there and  
24 Mr. Garcia was standing behind John Lindley.

25 Q. Who is John Lindley?

1 A. John Lindley was the department manager in  
2 charge of shoes.

3 Q. Was it Mr. Garcia that was making these  
4 comments?

5 A. Yes, sir, it was.

6 Q. And what was he saying again?

7 A. Says, "Looks like we have a bad boy here.  
8 Looks like he wants to try something. Go ahead. I want you  
9 to try something."

10 Q. In what tone of voice was he using when he  
11 said that?

12 A. The tone of voice gave me the impression that  
13 he wouldn't -- he was looking for an excuse to hurt  
14 somebody.

15 Q. Did that cause you some concern at that time?

16 A. Very much so, yes, sir.

17 Q. Were you taking Mr. Rivas' threats seriously?

18 A. I was taking his threats seriously, but he  
19 gave me the impression he really didn't want to hurt  
20 anybody, but he would if it became necessary.

21 Q. Did you try to keep all the employees calm  
22 yourself?

23 A. Yes, sir. I told them just to do what they  
24 were told and we would all go home for the holidays.

25 Q. After Mr. Garcia made those threatening

1 statements, what was the next thing that happened?

2 A. Mr. Rivas asked me if there was a room large  
3 enough for all the employees to fit into.

4 Q. And did you tell him there was?

5 A. I told them there was the employee breakroom  
6 back in the back of the store.

7 Q. What did he do then?

8 A. He told all the associates to turn to the  
9 right, put our hands out in front of us, and everybody was  
10 to follow me single file and I was to follow him back to the  
11 -- was to lead the way back to the breakroom.

12 Q. Now, before you went down there, was there  
13 another employee that was brought to the front?

14 A. Laura Fernandez was brought up from the back  
15 of the store.

16 Q. When did that happen?

17 A. Just after we turned to the right and where he  
18 asked me if we had a room large enough to put all the  
19 employees in.

20 Q. And where had she been or what area of the  
21 store had she been in, if you know?

22 A. I really don't know, but I believe she had  
23 been back by the restrooms.

24 Q. Did someone bring her up to the front?

25 A. Another one of them did, men did, yes, sir.



1 Q. Once she came to the front, what was her  
2 physical condition?

3 A. She was crying. She was real upset and her  
4 hands had been tied together. She had zipties around both  
5 her thumbs and they were tied together.

6 Q. Was she complaining about that?

7 A. Not at that point, no, sir. She was still  
8 scared and she was real upset.

9 Q. After she was brought up front, what happened  
10 then?

11 A. Mr. Rivas told me to lead everybody back to  
12 the breakroom and we started back to the breakroom. We got  
13 back by the tennis and golf department and Sandra asked if  
14 we could take the ties off of Laura's hands because they  
15 were cutting off the circulation. Her thumbs were turning  
16 blue.

17 Q. As you went through the store, was Mr. Rivas  
18 there with you?

19 A. He was right there beside me.

20 Q. Did he have his gun out?

21 A. Yes, he did.

22 Q. Did you see the other men out there with their  
23 guns out at that time?

24 A. They were back behind me. I didn't look and  
25 see if they were there.

1 Q. Let me show you the diagram again and point to  
2 the jury the direction you went through the store as you  
3 were being led to the back.

4 A. We started up at customer service and came  
5 down this way through the apparel department and came back  
6 over here to the golf and tennis department where Sandra  
7 asked if we could cut the ties off.

8 Q. And did you stop at that point in time?

9 A. Yes, sir, we did. Mr. Rivas asked what we  
10 would use to cut them off. I told him that on the tennis  
11 stringing machine there, there was a pair of wire cutters.  
12 We could use those to cut them off.

13 Q. Did you do that at that time?

14 A. He went and got the cutters and gave them to  
15 Sandra. I was watching it and Sandra was shaking real bad  
16 and I thought she might cut Laura's hands, so I took the  
17 cutters and I cut the ties off of Laura and gave them back  
18 to Mr. Rivas.

19 Q. Was anything else done at that time with the  
20 other employees?

21 A. At that point at least one of the employees  
22 was told to take off -- Darrin Ojeda was told to take off  
23 his red shirt and one of the other gentlemen put it on.

24 Q. After that where were you led?

25 A. He told me to take them on back to the

1 breakroom and we came in through this way into the  
2 breakroom.

3 Q. What happened once you were in the breakroom?

4 A. We all got into the breakroom. I was standing  
5 up in this corner and everybody else was around this way.  
6 And he told everybody to turn around and face the wall and  
7 to be quiet. And he told me to go with him.

8 Q. How many -- when you left the breakroom, how  
9 many people were back there with the employees?

10 A. At least two that I know of.

11 Q. Do you recall which ones were back there at  
12 that time?

13 A. It was George Rivas and -- or not Mr. Rivas.  
14 Mr. Rivas was with me. Mr. Garcia and Michael Gonzales --  
15 or Rodriguez.

16 Q. All right. Michael Rodriguez?

17 A. Michael Rodriguez and Joseph Garcia.

18 Q. Where did you go with Mr. Rivas at that time?

19 A. We started back to the front of the store,  
20 back up to customer service.

21 Q. And what happened up there?

22 A. We come around this corner right here back up  
23 by customer service. I noticed one of them, one of the  
24 other men up there at the store was wearing a red shirt of  
25 the Oshman's employee. Mr. Rivas asked me if we had a bag

1 large enough to put all the money in and I told him there  
2 were, over by the exercise mat.

3 Q. Okay. Did you go back to the exercise mat  
4 area at that time?

5 A. He said, "Let's go get a bag," and we walked  
6 back down to the bag wall. This is the bag wall right here.  
7 And I told him the bag wall is right there and he walked up  
8 to it and pulled a blue Adidas bag off the wall.

9 Q. Where did you go then?

10 A. Then we went back up to customer service.

11 Q. And what happened once you were at customer  
12 service?

13 A. We went to this register here first. He asked  
14 me if I opened up the drawer would it set off an alarm. I  
15 told him it would not set off the alarm. He told me to open  
16 the register.

17 Q. Did you get the cash out at that time?

18 A. I opened up the register. He asked if I lift  
19 up the tray would it sound off an alarm. I told him no. He  
20 reached over and picked up the tray. There was credit card  
21 receipts and checks under there. He said he didn't want  
22 those and told me to put the cash in the bag.

23 Q. What did you do then?

24 A. I put all the cash in the bag out of those  
25 drawers and the other register up there at customer service

1 and the cash drawer right there at the end.

2 Q. What happened next?

3 A. I started at the bin that I put the register  
4 from the gun counter in and I stopped there and was putting  
5 the money out of that drawer into the bag and he asked me  
6 for my car keys.

7 Q. And what did you say?

8 A. "You're going to take my vehicle, too?"

9 Q. What did he say?

10 A. He said, "You'll get it back. We're only  
11 going to take it a couple of blocks or so."

12 Q. Where did you go then?

13 A. After I emptied all the registers, he said  
14 that he wanted the videotape and we went back to the video  
15 room.

16 Q. Now, as you made your way back to the video  
17 room, did you go in it at that time?

18 A. No, sir. As I was unlocking the door to the  
19 video room, he noticed another door down at the end of the  
20 hallway and he asked me what was behind that door.

21 Q. Let me show you State Exhibit 22. Does that  
22 show the hallway?

23 A. Yes, sir, it does.

24 Q. And what went to that other door?

25 A. I told him that the other door was just a room

1 where we store supplies, pens, and paper, paper clips,  
2 staples, and he told me to open the door.

3 Q. We're talking about the door here at the end  
4 of the hallway?

5 A. Yes, sir.

6 Q. Okay. And then you opened that door and what  
7 was in that room?

8 A. In that room, immediately in that room was the  
9 supplies that I told him about, but there was also another  
10 door that led into the cash office.

11 Q. What did he say at that time?

12 A. He told me to open the door. When I opened  
13 the door he saw the safe and he said, "Nice try."

14 Q. And that's when the door is opened and that's  
15 the safe?

16 A. Yes, sir.

17 Q. And he said, "Nice try," at that point in  
18 time?

19 A. Yes, sir.

20 Q. And then what happened?

21 A. He told me to open the safe. And as I opened  
22 up the safe he told me to put all the money in the bag.

23 Q. Did you have a lot of cash in the safe at that  
24 point in time?

25 A. At that time we had a total of about \$100,000

1 in cash in the safe.

2 Q. Okay. Did Mr. Rivas or did you take the cash  
3 out of the safe?

4 A. I was taking the cash out of the safe and  
5 putting it in the bag. He was standing behind me, looking  
6 over my shoulder.

7 Q. Did he say anything else to you at that time?

8 A. There was a couple of boxes in there with cash  
9 in it. One of them was marked "employee fund." And he told  
10 me not to take the employee fund. He was stealing from  
11 Oshman's, not the employees.

12 Q. And what did you say?

13 A. I just turned and looked and told him he was  
14 taking my vehicle.

15 Q. What did he say at that point in time?

16 A. He said, "I told you, you would get it back."

17 Q. After he got all the cash out of the safe,  
18 what happened then?

19 A. He then said that he wanted to go back and get  
20 the videotape.

21 Q. Did he retrieve or did you retrieve the  
22 videotape for him?

23 A. We went out and I opened the door of the video  
24 room and he stepped in and took the tape out of the VCR.

25 Q. Where did you go then?

1           A.       And he said, let's go back to the gun  
2 department and we started back to the guns.

3           Q.       Let me show you State Exhibit 24. Is that as  
4 you come out of the office area and head back towards the  
5 gun department?

6           A.       Yes, sir, it is.

7           Q.       And State Exhibit 25, is that the area where  
8 the guns are kept?

9           A.       Yes, sir.

10          Q.       Did you see anyone, any of the other robbers,  
11 at that time back in the gun department?

12          A.       Yes, sir, I did. I noticed one back there and  
13 later identified as Donald Newbury.

14          Q.       Okay. Where was he located?

15          A.       He was behind the counter, standing in front  
16 of the rifles and shotguns.

17          Q.       Did Mr. Rivas take you over to him at that  
18 time?

19          A.       We started back over there and we got about to  
20 where those orange vests were and Mr. Newbury told him the  
21 handguns were not in the cases.

22          Q.       Okay. Then what happened?

23          A.       Mr. Rivas asked me where they were at and I  
24 told him they were locked up in the gunroom in the safe.

25          Q.       Did he ask you to take him to that gunroom at



1 that time?

2 A. Yes, sir, he did.

3 Q. Let me show you State Exhibit 30. Is this the  
4 gunroom and the safe where the handguns are held?

5 A. Yes, sir, it is.

6 Q. State Exhibit 32, what do we see there on the  
7 floor?

8 A. Those are padded four-by-four sheets of wood  
9 that we used or two-by-two sheets of wood that we use when  
10 we put the guns in the safe. We took them out of the case  
11 and put them on those and took them back and put those  
12 boards with the guns on them into the safe.

13 Q. And when you took Mr. Rivas back there, were  
14 the handguns loaded onto those boards inside the safe?

15 A. Yes, sir, they were.

16 Q. And then State Exhibit 31, is that a  
17 photograph of the -- how the safe appears after the guns are  
18 taken out?

19 A. Yes, sir.

20 Q. Okay. After you opened that safe for him,  
21 what did you do then?

22 A. We went back out to the gun counter and we  
23 started back there and he told Mr. Newbury that the safe was  
24 open, the door was open, to go get the guns.

25 Q. Let me show you State Exhibit 26. Were y'all

1 actually at the gun counter at that time?

2 A. We were walking back up there and Mr. Newbury  
3 asked, said something about the rifles and shotguns being  
4 locked.

5 Q. Okay. Is this the wall where the rifles and  
6 shotguns are kept?

7 A. Yes, sir.

8 Q. After he made that statement, what happened?

9 A. Mr. Rivas asked me where the key was to unlock  
10 them. I had it hanging on my belt loop. I took it off,  
11 handed him the key, and told him which one it was and he  
12 gave it to Mr. Newbury.

13 Q. Let me show you State Exhibit 27, a closer  
14 view of that counter. Does that appear to be your keys?

15 A. Yes, sir, it is.

16 Q. We see behind there various boxes. What are  
17 those boxes?

18 A. It's ammunition for the guns that we sell.

19 Q. Y'all have various kinds of ammunition there?

20 A. Yes, sir.

21 Q. And then State Exhibit 28, does that show the  
22 rack of long guns with some of them actually missing?

23 A. Yes, sir.

24 Q. After you handed those keys over to -- and had  
25 them placed on the counter, what happened then?

1           A.       Mr. Rivas told me to come with him and we went  
2 back to the employee breakroom.

3           Q.       State Exhibit 33, is that the hallway leading  
4 back to the breakroom?

5           A.       Yes, sir, it is.

6           Q.       And then 34, is that how the breakroom appears  
7 when you first go into it?

8           A.       Yes, sir, it is.

9           Q.       What was going on in the breakroom when you  
10 were taken back there?

11          A.       Mr. Garcia and Mr. Rodriguez had all the  
12 employees and they were down on their -- either laying down  
13 or down on their knees, facing the wall with their hands  
14 behind their back. They were going through their pockets,  
15 taking personal belongings and tying them up.

16          Q.       Okay. What was the demeanor of the store  
17 employees back there?

18          A.       They were scared. Some of them were crying.

19          Q.       Did you ever hear Mr. Rivas communicate over  
20 that radio other than the time at the very front?

21          A.       After he left me in the breakroom and left,  
22 yes, sir.

23          Q.       And when he took you, first took you into the  
24 breakroom, did any of these other individuals have contact  
25 with you?

1           A.       Yes, sir. I stood and standing there by the  
2 refrigerator, I was looking at the other employees seeing  
3 what kind of -- how they were doing and everything. And  
4 Mr. Rodriguez came up to me, grabbed me on my left shoulder,  
5 told me to turn around -- pushed me and told me to turn  
6 around, kicked me behind my knees, and told me to get on the  
7 floor and put my hands behind my back.

8           Q.       So he forced you onto your knees by kicking  
9 you behind your knees?

10          A.       Yes, sir, he did.

11          Q.       And then you were on your knees, facing the  
12 wall?

13          A.       Yes, sir.

14          Q.       Let me show you State Exhibit 35. Is this a  
15 view of the room of how it appeared at that time?

16          A.       Yes, sir.

17          Q.       State Exhibit 36, does this show some of the  
18 ties that were used to tie the employees up with?

19          A.       Yes, sir.

20          Q.       Now, were you ever tied up yourself?

21          A.       No, sir, I was not.

22          Q.       After Mr. Rivas left, were the employees still  
23 being searched and tied up at that time?

24          A.       Yes, sir. He told them -- Mr. Rivas told them  
25 to get everybody tied up. He was going out front to get the

1 vehicle and he would meet everybody around back.

2 Mr. Rodriguez, after he forced me down, he went through my  
3 pocket and took my wallet, took my house keys, and a couple  
4 of dollars that I had in cash in my front pocket.

5 Q. So he took your wallet, house keys, and any  
6 cash that you had at that time?

7 A. Yes, sir.

8 Q. At that point in time Mr. Rivas had left the  
9 back room?

10 A. Yes, sir.

11 Q. Okay. Did you hear Mr. Rivas communicating  
12 over the radio after that time?

13 A. Yes, sir. I heard over the radio, I heard him  
14 telling them to come on, to hurry up and come on. One of  
15 them responded that they hadn't finished tying everybody up  
16 yet. He told them to get out. They had company.

17 Q. Said get out, they had company?

18 A. Yes, sir.

19 Q. Did they appear to be in a hurry after that?

20 A. Yes, sir, they did.

21 Q. Okay. Did they leave the breakroom shortly  
22 after that?

23 A. Shortly after that one of them told us not to  
24 move for ten minutes or they would be back and I heard the  
25 door close and it was real quiet in the room.

1 Q. Did you ever hear Mr. Rivas say anything about  
2 a smoke grenade or alarm or anything like that?

3 A. I believe I heard Mr. Rivas telling them to  
4 set off the alarm in the back door when they went out.

5 Q. So after Mr. Rivas said, hurry up, we have  
6 company, they left shortly after that?

7 A. Yes, sir.

8 Q. And you heard the door close?

9 A. Yes, sir.

10 Q. Was it -- how long after that that they left  
11 that you heard something outside the building?

12 A. About 30, 25, 30 seconds later.

13 Q. Okay. You didn't have a stopwatch on it?

14 A. I had my wristwatch on, but I didn't look at  
15 it.

16 Q. And then what's the next thing that you heard?

17 A. I heard what I believed to be gunfire.

18 Q. Where did the gunfire -- where did it sound  
19 like it was coming from?

20 A. It sounded like it was coming from out behind  
21 the store.

22 Q. What type of gunfire did you hear?

23 A. It was rapid succession with short breaks.

24 Q. Okay. When it started, was it continuous?

25 A. It was pretty continuous and then a short

1 pause and then more shots.

2 Q. The first shots you heard, though, were they  
3 one right after the other?

4 A. Yes, sir,

5 Q. Bang, bang, bang, bang, bang?

6 A. Yes, sir.

7 Q. And then there would be very short pauses?

8 A. Yes, sir.

9 Q. How long were the short pauses?

10 A. Three or four seconds.

11 Q. Okay. How many shots did you think you heard?

12 A. I estimated between 25 and 30 shots had been  
13 fired.

14 Q. Did you hear anything else besides the  
15 gunshots going off?

16 A. No, sir, I did not.

17 Q. What was the demeanor of the employees back  
18 there when they heard the gunshots going off?

19 A. One of the male employees sitting right next,  
20 sitting next to me asked me what it was. I told him it  
21 sounded like gunfire. I had no idea what they were shooting  
22 for. Could be they were just trying to draw attention to  
23 the store or they were celebrating that they had got away  
24 with it.

25 Q. Were you trying to keep the employees calm at

1 that time?

2 A. I was trying to keep everybody calm. I told  
3 them to stay still and calm down.

4 Q. Okay. Now, do you know how long these events  
5 took place from the time Mr. Rivas actually pulled the gun  
6 out to the time that they left the back of that breakroom?

7 A. When I made the announcement, it was just  
8 about three minutes after 6:00. I looked at my watch to  
9 make sure -- time was after -- and then after I heard the  
10 gunfire, I turned -- I pulled my hand around and I looked at  
11 my watch and it was about 6:36.

12 Q. Okay. So we're talking about roughly 30  
13 minutes?

14 A. Yes, sir.

15 Q. So now you had the employees back there and  
16 you told them to be quiet. What's the next thing that you  
17 did?

18 A. I told them that I wasn't tied up. One of the  
19 girls told me -- asked me not to go anywhere. I told her I  
20 wasn't going anywhere. And I asked the other managers if  
21 any of them still had their keys to the store.

22 Q. Did any of them still have keys?

23 A. Tim Moore still had the keys in his pocket.

24 Q. What did you do then?

25 A. I reached into his front pocket and took his



1 keys out and I untied the employee next to him and I told  
2 him to start untying the other associates, to stay in that  
3 room and be quiet.

4 Q. What did you do then?

5 A. Just off to by the breakroom there's a  
6 separate office for the regional loss prevention office and  
7 our key to the store would open that door. I went in there  
8 and used the private telephone line in there because it  
9 wouldn't light up, up front because it was a separate line.  
10 And they wouldn't know I was on the phone, if anybody was  
11 still in the store.

12 Q. Let me show you State Exhibit 37. Is this a  
13 photograph of that office you went to?

14 A. Yes, sir, it is.

15 Q. And that's the phone there that you used?

16 A. Actually the one I used was behind the desk.

17 Q. All right. Did you call the 911 operator at  
18 that time?

19 A. I called the 911 operator, told her who I was,  
20 and what had just happened and I hung up and I went out and  
21 I finished helping untie the rest of the employees.

22 Q. Okay. Then what did you do?

23 A. Then I went back into that room and I called  
24 back the 911 operator and I stayed on the phone with them  
25 until such time as the police came in.

1 Q. Okay. And in communicating with the police  
2 did you receive instructions as to how you would be taken  
3 out of the Oshman's?

4 A. They just told me to bring all the employees  
5 into that room, told everybody -- have everybody get down  
6 and put their hands behind their head with their heads  
7 between their legs.

8 Q. And did you wait on the police, then, in that  
9 room?

10 A. Yes, we did.

11 Q. Did that take some time?

12 A. It was -- I would say it was over an hour  
13 before they finally came in.

14 Q. And how did they remove you from that room?

15 A. They came through the door and they asked for  
16 me first and then they asked if there were any bad guys in  
17 the room. And then they told everybody to stand up and they  
18 patted everybody down individually and let everybody out  
19 single file out the back door behind the store.

20 Q. Okay. Let me show you State Exhibit 38. Does  
21 this show the back of the store where you were let out?

22 A. Yes, sir. We came out under that door -- that  
23 door under that light right there.

24 Q. Okay. Which direction did you go?

25 A. We came out this way around behind the fire

1 truck and around the other side of the fire truck.

2 Q. At that time did you see this squad car parked  
3 kind of underneath this trailer?

4 A. I did not notice it, no, sir.

5 Q. After you made it out of the store, what did  
6 you do then?

7 A. We stood out there by that fire truck for  
8 about forty-five minutes to an hour and they told me that  
9 they were bringing a bus down to take everybody down to  
10 police headquarters.

11 Q. Did you go down to police headquarters at that  
12 time?

13 A. At that time, no, sir, I did not. I was  
14 placed in the back of a police car, a patrol car, and stayed  
15 there at the scene while everybody else was taken down to  
16 police headquarters.

17 Q. On the patrol car did you talk or have a  
18 conversation with Detective Randall Johnson?

19 A. Yes, sir, I did.

20 Q. What types of things were you telling him at  
21 that time?

22 A. I gave him a statement. I dictated a  
23 statement to him and he wrote it out.

24 Q. Did it go over the same details that you have  
25 given this jury this morning?

1 A. Yes, sir.

2 Q. After you were giving that statement, what did  
3 you do then?

4 A. We sat in the car -- I sat in the car until  
5 about -- I guess it was about 11:30, 12:00, and he came in  
6 and he took me down to the police headquarters.

7 Q. What happened once you made it down to the  
8 police headquarters?

9 A. He took me into a room and there was an  
10 eight-foot table there with some photographs on it.

11 Q. Did they give you any instructions at that  
12 time?

13 A. They told me to look at the photographs, see  
14 if I could identify any of those individuals as being the  
15 ones in the store that evening, not to pay any attention to  
16 things that could change, such as hair color, facial hair.  
17 Look for things that don't change.

18 Q. Let me show you what has been marked as State  
19 Exhibit 41. Is this a photograph of the photo lineup that  
20 you looked at that evening?

21 A. Yes, sir.

22 MR. SHOOK: Your Honor, at this time we  
23 offer State Exhibit 41.

24 MR. SANCHEZ: No objection, Your Honor.

25 THE COURT: No. 41 shall be admitted.

1 Q. (By Mr. Shook) Let me show you State Exhibit  
2 45. Does this look like the actual photographs that you  
3 looked at in the same order that you viewed them that  
4 evening on the tabletop?

5 A. Yes, sir, it does.

6 MR. SHOOK: Your Honor, at this time we  
7 offer State Exhibit 45.

8 MR. SANCHEZ: No objection, Your Honor.

9 THE COURT: No. 45 shall be admitted.

10 Q. (By Mr. Shook) The monitor shows how the  
11 photographs were displayed on the table. Were they  
12 displayed in the same order that we see in State Exhibit 45?

13 A. Yes, sir.

14 Q. Okay. That evening were you able to make an  
15 identification of some of the robbers that were there in the  
16 store?

17 A. I identified four positively -- four  
18 positively and two tentative.

19 Q. Who were the four positive that you identified  
20 at that time?

21 A. No. 4, No. 7 --

22 Q. No. 4 would be George Rivas?

23 A. George Rivas. No. 7 is Rodriguez.

24 Q. Okay.

25 A. No. 15 is Garcia. And No. 11.

1 Q. Is that Donald Newbury?

2 A. Yes, sir.

3 Q. And who were the tentative identifications  
4 that you made that evening?

5 A. I believe it was No. 2.

6 Q. Is that -- you later come to know his name as  
7 Randy Halprin?

8 A. Yes, sir. And the other one was No. 9.

9 Q. And that was later identified to you as Larry  
10 Harper?

11 A. Yes, sir.

12 Q. Was Mr. Harper the other man that was dressed  
13 in the security guard uniform?

14 A. Yes, sir, I believe it was.

15 Q. After making those identifications, did you  
16 then go back to the Oshman's?

17 A. Yes, sir. We went back down to the Oshman's  
18 store and waited for the building to be cleared.

19 Q. Okay. After the building was cleared, what  
20 did you do then?

21 A. Detective Johnson took me through the store  
22 that evening and we walked through the chain of events that  
23 happened earlier.

24 Q. Did you explain the events and take him  
25 through the store physically?

1 A. Yes, sir.

2 Q. All right. Now, after you went through those  
3 events with Detective Johnson, were you asked to make an  
4 inventory of the weapons and other items that were taken  
5 from the Oshman's?

6 A. They asked me to make that inventory, yes,  
7 sir, and Monday morning I came back into the store and I did  
8 complete that inventory.

9 Q. The weapons that you sell there, do you keep a  
10 log as to the serial numbers, the type of weapons, and that  
11 sort of thing?

12 A. Yes, sir, we do.

13 Q. Is there a unique serial number assigned to  
14 each weapon?

15 A. Yes, sir.

16 Q. And were you able to determine the exact  
17 number and which weapons had been stolen during the robbery?

18 A. Yes, sir, I was.

19 Q. And did you give that information over to the  
20 Irving Police Department?

21 A. The Irving Police Department as well as the  
22 ATF.

23 Q. Let me show you three posters which have been  
24 marked State Exhibits 46, 47, and 48. And do these appear  
25 to be the -- a list of the weapons taken, the types of

1 weapons, along with their individual serial numbers?

2 A. Yes, sir, it does.

3 MR. SHOOK: Your Honor, at this time we  
4 will offer State Exhibits 46, 47, and 48.

5 MR. SANCHEZ: We have no objection, Your  
6 Honor.

7 THE COURT: Nos. 46 through 48 shall be  
8 admitted.

9 Q. (By Mr. Shook) Let me show you State Exhibit  
10 46 for demonstrative purposes. What do we see here on the  
11 exhibit?

12 A. That's a list of handguns and rifles and  
13 shotguns that were taken that evening.

14 Q. Okay. The first category we see on the  
15 exhibit, is that the manufacturer of the weapon?

16 A. Yes, sir. The first one up there is the  
17 Berreta.

18 Q. And then the next information is what?

19 A. That's the specific model of that type of  
20 Beretta handgun that was taken.

21 Q. And then the information in blue, what was  
22 that?

23 A. That's the serial number assigned to that  
24 individual weapon.

25 Q. Okay. So there was a total of 44 guns taken



1 from the Oshman's during the robbery?

2 A. Yes, sir.

3 Q. Thirty-four handguns?

4 A. Yes, sir.

5 Q. And then seven shotguns and three rifles?

6 A. Yes, sir.

7 Q. Was there also ammunition taken from the  
8 Oshman's?

9 A. Yes, sir. Several boxes of .357 Magnum  
10 ammunition, 9 millimeter, .45 caliber.

11 Q. Okay. What other types of items do you recall  
12 being stolen during the robbery?

13 A. They took some -- they took some nightvision  
14 goggles and binoculars, sleeping bags, cold weather items,  
15 jackets.

16 Q. Did you ever determine the exact amount of  
17 cash that was taken?

18 A. There was right at \$100,000 in cash taken that  
19 night.

20 Q. Now, your car, did you ever locate your car,  
21 the white Ford Explorer?

22 A. Yes, sir. I learned it was later recovered  
23 later that evening.

24 Q. Let me show you State Exhibit 50. Is that the  
25 Ford Explorer?

1 A. Yes, sir, it is.

2 Q. These are your Marine stickers there on the  
3 back of the vehicle?

4 A. Yes, sir.

5 Q. Was there any damage done to the inside of the  
6 vehicle?

7 A. Yes, sir, there was. The driver's door had  
8 two bullet holes on the inside. There was quite a bit of  
9 blood in the driver's seat. The front door on the passenger  
10 side, the window had either been broken out or shot out.

11 Q. Okay. State Exhibit 49, is that the front of  
12 the vehicle?

13 A. Yes, sir.

14 Q. Did it appear that during the course of this  
15 robbery that all the robbers together were working as a  
16 team?

17 A. Yes, sir. They were all there working  
18 together. Mr. Rivas appeared to be the leader.

19 Q. Okay. Did they appear to each have an  
20 individual role?

21 A. Yes, sir.

22 Q. And for the record is that Oshman's located  
23 here in Dallas County and the State of Texas?

24 A. Yes, sir, it is.

25 MR. SHOOK: We'll pass the witness, Your

1 Honor.

2 CROSS-EXAMINATION

3 BY MR. SANCHEZ:

4 Q. Mr. Ferris, you had testified earlier that  
5 Mr. Rivas had taken your keys and gotten your white  
6 Explorer. Did you see where he went after he did that?

7 A. No, sir. I was in the employee breakroom.

8 Q. When that happened, did that happen before he  
9 got any call that somebody was on the way or that they had  
10 company?

11 A. I was already in the breakroom when I heard it  
12 over the radio that they had company, so I'm assuming he was  
13 outside the building.

14 Q. Okay. Now, when the keys were taken from you,  
15 though, was that before?

16 A. That was before.

17 Q. Do you remember how long before --

18 A. It was --

19 Q. -- before there was company or somebody was on  
20 the way occurred?

21 A. It would have been about 15 or 20 minutes,  
22 because it was while I was emptying the registers up front.

23 Q. After he took the keys from you, you didn't  
24 see where he went or maybe even if he went outside. Do you  
25 recall?

1           A.       When he first took the keys from me, he was  
2 with me for another 15 or 20 minutes, going through the  
3 store and emptying the safe and emptying the gun safe and  
4 then back to the employee breakroom. And then he left and I  
5 never saw him again.

6           Q.       You have testified that you felt that he was  
7 the leader. When he spoke could you tell that the other  
8 people who were in the store you identified as the robbers,  
9 did they listen to him or were they afraid of him? Could  
10 you tell?

11          A.       I don't think they were afraid of him. But  
12 they did listen to him.

13          Q.       Did he ever chastise them in your presence as  
14 to doing something they shouldn't be doing?

15          A.       No, sir.

16          Q.       Of course, you were never tied up yourself?

17          A.       No, sir.

18          Q.       And he explained to you, if you did everything  
19 he asked, no one would get hurt, correct?

20          A.       Yes, sir.

21          Q.       Okay. Now, in the whole time you were with  
22 Mr. Rivas, you said that you could hear over the radio  
23 voices?

24          A.       Yes, sir.

25          Q.       Were they different voices?

1 A. A couple of different voices, yes, sir.

2 Q. At any time you were with him could you hear  
3 or did you hear anybody say that somebody was near the  
4 window or looking into the store or anything like that?

5 A. No, sir.

6 Q. And at times you were close enough you could  
7 hear clearly what was being said over that radio, correct?

8 A. Yes, sir.

9 MR. SANCHEZ: That's all we have, Your  
10 Honor. Pass the witness.

11 REDIRECT EXAMINATION

12 BY MR. SHOOK:

13 Q. Mr. Ferris, just a couple more questions.  
14 Now, he first took your keys while you were at the front of  
15 the store; is that right?

16 A. Yes, sir.

17 Q. But at that point in time he didn't leave you  
18 at that time, did he?

19 A. No, sir.

20 Q. Once Mr. Rivas took you to the back breakroom  
21 and left you, you don't know where he went at that time; is  
22 that right?

23 A. No, sir, I don't.

24 Q. Did he say anything where he was going at that  
25 time?

1           A.       He told them to tie everybody up. He was  
2 going out to get the vehicle and he would meet them out  
3 back.

4           Q.       He said that he would meet them out back?

5           A.       Yes, sir.

6           Q.       And at that point in time is where you were  
7 forced to the ground and your wallet was taken?

8           A.       Yes, sir.

9           Q.       But you weren't tied up at that time?

10          A.       No, sir, I was not.

11          Q.       After you were forced to the ground, were they  
12 continuing tying employees up and that sort of thing?

13          A.       Yes, sir.

14          Q.       And then was it Mr. Rivas that came over the  
15 radio and was talking to the -- to Mr. Rodriguez and  
16 Mr. Garcia in the breakroom sometime after that?

17          A.       Yes, sir.

18          Q.       And what is it again did he say at that time?

19          A.       He told them to hurry up, they had to go. One  
20 of them responded that they hadn't finished tying everybody  
21 up. And he said, we've got company. We've got to go.

22          Q.       And then they left after that?

23          A.       Yes, sir.

24          Q.       Okay.

25                   MR. SHOOK: That's all we have, Judge.

1 MR. SANCHEZ: That's all we have, Your  
2 Honor.

3 THE COURT: Witness subject to recall or  
4 excused?

5 MR. SHOOK: May this witness be excused  
6 and we can have him on standby?

7 MR. SANCHEZ: That's fine, Your Honor.

8 THE COURT: Thank you, Mr. Ferris, you  
9 may stand down. You are on standby and you are still under  
10 the Rule.

11 THE WITNESS: Yes, sir.

12 THE COURT: Folks, we'll take our morning  
13 break until about 10:35.

14 [Jury out]

15 (Recess)

16 THE COURT: All right.

17 [Jury in]

18 THE COURT: Thank you, you may have a  
19 seat. Mr. Shook, call your next witness.

20 MR. SHOOK: We'll call Officer Cassout.

21 THE COURT: Let the record reflect this  
22 witness has been sworn.

23 TIMOTHY CASSOUT,  
24 having been duly sworn, was examined and testified as  
25 follows:

DIRECT EXAMINATION

BY MR. SHOOK:

Q. Would you tell us your name, please.

A. Timothy Cassout.

Q. And how are you employed, sir?

A. As a police officer for the City of Irving.

Q. How long have you been with the City of Irving?

A. I've been there for five years now.

Q. What are your duties?

A. As a patrolman.

Q. Okay. Are you also a member of the Armed Forces?

A. Yes, I am.

Q. What branch are you in?

A. The Army.

Q. Okay. The past couple of years, have you been on active duty?

A. Yes, sir, I have.

Q. What particular division do you work in with Irving Police Department?

A. Patrol.

Q. And what are your duties as a patrol officer?

A. Respond to calls for service, enforce state laws, city ordinances.



1 Q. Okay. What shift do you work?

2 A. Right now I'm working nights.

3 Q. Okay. And I take it you came directly from  
4 off 'shift today to the courtroom; is that right?

5 A. Yes, sir.

6 Q. So you have been up for a while?

7 A. Yes, sir.

8 Q. All right. Let me turn your attention back to  
9 December 24th of 2000. I'll ask if you had come on duty  
10 that evening as a patrol officer?

11 A. Yes, sir, I did.

12 Q. Approximately what time did you come on duty?

13 A. I think it was 3:45, sir.

14 Q. Did you know another officer by the name of  
15 Aubrey Hawkins?

16 A. Yes, sir, I did.

17 Q. Is that a photograph of Aubrey Hawkins in  
18 uniform there to your left?

19 A. Yes, sir, it is.

20 Q. Did he come on duty at the same time you did  
21 that evening?

22 A. Yes, sir, he did.

23 Q. What portion of the City of Irving were you  
24 patrolling that evening?

25 A. I was working 42 beat.

1 Q. Okay. Explain to the jury how your -- what  
2 areas of the city you patrol, how that's laid out.

3 A. The city is broken down into several different  
4 beats. My beat I was working that night was 42 beat. It's  
5 north of 183 between Beltline and the west city limits.

6 Q. So all officers on patrol have a particular  
7 beat they are assigned to?

8 A. Yes, sir, they do.

9 Q. If the dispatcher were going to notify you of  
10 a call, does she use your beat number to talk to you?

11 A. Yes, sir.

12 Q. That evening what number would she have used?

13 A. 242.

14 Q. Okay. What does the 2 signify?

15 A. Signifies which shift you are on, evening  
16 shift in that case.

17 Q. And do you recall what beat Officer Hawkins  
18 was assigned to that evening?

19 A. 234.

20 Q. I want to turn your attention now to about  
21 6:30 that evening and ask where you were located in your  
22 patrol car at that time?

23 A. I was in a parking lot of the Irving Mall.

24 Q. Okay. Is that Irving Mall located across the  
25 highway from the Oshman's Sporting Goods Store?

1 A. Yes, sir, it is.

2 Q. I want to show you what's been marked as State  
3 Exhibit 51. Actually, let me show you what has been marked  
4 as State Exhibits 51 through 58. Do these show some aerial  
5 views of the Oshman's store as well as the area behind the  
6 Oshman's as it appeared that night?

7 A. Yes, sir, it is.

8 MR. SHOOK: Your Honor, at this time we  
9 offer State Exhibit 51 through 58.

10 MR. SANCHEZ: We have no objection, Your  
11 Honor.

12 THE COURT: Nos. 51 through 58 shall be  
13 admitted.

14 Q. (By Mr. Shook) State Exhibit 51, is that an  
15 aerial view of the Oshman's as well as where you were  
16 located at the mall?

17 A. Yes, sir.

18 Q. We see the Oshman's here kind of in the center  
19 of the photograph?

20 A. Yes, sir.

21 Q. And what is this road we see here?

22 A. That would be State Highway 183.

23 Q. And this group of buildings here?

24 A. Would be the Irving Mall.

25 Q. If we could get a little closer up of the

1 Irving Mall area. Now, is the mall open or closed at that  
2 time?

3 A. It was closed.

4 Q. What part of the mall parking lot were you  
5 located at?

6 A. It would be to the extreme left of the  
7 picture.

8 Q. Down in this area?

9 A. A little farther to the left, sir.

10 Q. Over here?

11 A. Yes, sir.

12 Q. Okay. And were you answering a call or were  
13 you just sitting in the parking lot at that time?

14 A. I was sitting in the parking lot.

15 Q. Were you by yourself?

16 A. Yes, sir, I was.

17 Q. Were you on the phone?

18 A. Yes, sir.

19 Q. Okay. How about your window, was it up or  
20 down?

21 A. It was down.

22 Q. As you were sitting there around 6:30 that  
23 evening, did you hear anything unusual?

24 A. Yes, sir, I did.

25 Q. What was that?

1 A. Sounded like fireworks were going off.

2 Q. Okay. What type of fireworks?

3 A. Firecrackers, a package of firecrackers.

4 Q. As if someone had set off a string of  
5 firecrackers?

6 A. Yes, sir.

7 Q. Did the pops or the bangs go one right after  
8 the other?

9 A. Yes, sir, in rapid succession.

10 Q. Now, somewhere around that time were you  
11 dispatched to a call after that?

12 A. Yes, sir, I was.

13 Q. What type of call was that?

14 A. A suspicious persons call, sir.

15 Q. Okay. Now, had some units already been  
16 dispatched to that call already?

17 A. Yes, sir. And where was that call located?

18 A. It was at the Oshman's.

19 Q. Okay. You had monitored that call. The  
20 dispatcher had already sent some units there?

21 A. Yes, sir.

22 Q. How much prior to you hearing the  
23 firecrackers, what you believed to be firecrackers, had that  
24 occurred?

25 A. It was a real short amount of time. I

1 couldn't give you an exact time.

2 Q. Okay. Do you recall which units were sent to  
3 the Oshman's prior to that?

4 A. 234 and I think 223, but I'm not sure on that.

5 Q. You are sure on 234, though?

6 A. Yes, sir.

7 Q. Was 234 Officer Aubrey Hawkins?

8 A. Yes, sir, it was.

9 Q. So he had already been dispatched to the.  
10 Oshman's and then you heard this string of firecrackers?

11 A. Yes, sir.

12 Q. And shortly after that you were then also  
13 dispatched?

14 A. Yes, sir.

15 Q. Who dispatched you to the Oshman's?

16 A. Dispatch did.

17 Q. Did they do that per instructions of any  
18 supervisors?

19 A. Yes, sir.

20 Q. Who was that?

21 A. It would be Sergeant Norton.

22 Q. He asked for more units to go there?

23 A. Yes, sir.

24 Q. Okay. Which direction or how did you get to  
25 the Oshman's at that point in time?

1           A.       I took the north service road to 183 to  
2       Esters, went across the highway on the overpass and came  
3       back down on the south service road.

4           Q.       So you would have gone this way down the  
5       service road?

6           A.       Yes, sir.

7           Q.       Gone down to Esters and then come back up this  
8       way?

9           A.       Yes, sir.

10          Q.       And which direction did you come into the  
11       Oshman's?

12          A.       I came in from the north on Willow Creek.

13          Q.       Is that Willow Creek the street located behind  
14       the Oshman's?

15          A.       Yes, sir, it is.

16          Q.       Did you come this direction?

17          A.       Yes, I did.

18          Q.       All right. Let me show you State Exhibit 52,  
19       which shows a different angle. Does this show Willow Creek  
20       as you would have driven into the Oshman's?

21          A.       Yes, sir, it does.

22          Q.       And this is the back area of the Oshman's?

23          A.       Yes, sir, it is.

24          Q.       And what is this to your right, right here?

25          A.       It's a used car lot.

1 Q. Okay. And then this area here?

2 A. It's an open field.

3 Q. Okay. State Exhibit 53, a side view, does  
4 that show the area you were driving to at that time?

5 A. Yes, sir, it is.

6 Q. Coming from this direction here?

7 A. Yes, sir, it does.

8 Q. Okay. Now, as you were making your way to the  
9 Oshman's, did you have some concerns about that particular  
10 call?

11 A. Yes, I did.

12 Q. What were those concerns?

13 A. That they were checking on 34's status and he  
14 wasn't answering the radio.

15 Q. Explain to the jury what checking on a unit's  
16 status is.

17 A. An officer is dispatched to a call, if it's  
18 something is real suspicious or a person is checked out for  
19 a while; usually ten minutes, dispatch will call the officer  
20 on the radio and ask them if they are all right and the  
21 officer will respond. If everything is okay, it's a Code 4  
22 or respond otherwise, if he needs help or something.

23 Q. As a patrol officer are you also equipped with  
24 a radio that is attached to your belt?

25 A. Yes, sir.



1 Q. So you can talk to the dispatcher in the car,  
2 as well as after you have exited the car?

3 A. Yes, sir.

4 Q. As you were making your way to the Oshman's,  
5 was the dispatcher checking on Officer Hawkins' status?

6 A. Yes, sir, she was.

7 Q. And was he answering?

8 A. No, sir.

9 Q. And that aroused your suspicions?

10 A. Yes, sir, it did.

11 Q. How fast did you come in up Willow Creek  
12 there?

13 A. I got there pretty quick, sir.

14 Q. Once you arrived did you notice anything  
15 unusual?

16 A. Yes, sir, I did.

17 Q. What was that?

18 A. I saw debris laying in the roadway and the --  
19 his car was kind of backed up against a semitrailer.

20 Q. Let me show you State Exhibit 56. Kind of  
21 shows a direct overview of the back parking lot area. How  
22 close or where did you park your car?

23 A. The second entrance, I started to pull in --  
24 that's it now, sir.

25 Q. This way?

1 A. There you go. I started to pull in there.

2 Q. All right. Where did you stop your vehicle?

3 A. Just as I was starting to make the turn, sir,  
4 my Headlights would have been pointing directly towards the  
5 building.

6 Q. Okay. And you saw some debris in the roadway?

7 A. Yes, sir.

8 Q. Where was that located?

9 A. Come about if you go from the -- straight up  
10 to the road from the trash compactors up to the road, around  
11 that area.

12 Q. Okay. Now, did you see Officer Hawkins out  
13 anywhere at that time?

14 A. No, sir, I didn't.

15 Q. You saw his squad car, though?

16 A. Yes, sir, I did.

17 Q. Where was that located?

18 A. It was backed up against the back corner of  
19 the semitrailer.

20 Q. Let me show you State Exhibit 38. Does that  
21 show the position of Officer Hawkins' car?

22 A. Yes, sir, it does.

23 Q. Did that seem unusual to you?

24 A. Yes, it was.

25 Q. Once you stopped your car, what did you do?

1           A.       I stopped my car and I checked out. I asked  
2 if he had checked into a chase because of all the debris.  
3 And I spotlighted the field to make sure there was nobody  
4 running out there.

5           Q.       Did you see anyone running at all?

6           A.       No, sir.

7           Q.       Okay. Then what did you do?

8           A.       Then I got out of the car -- or I started to  
9 pull into, the rest of the way into the parking lot or the  
10 loading bay and then I saw a person laying on the ground.

11          Q.       Where in the parking lot area did you see the  
12 person?

13          A.       It was just to the north of the trash  
14 compactor.

15          Q.       If we're looking at State Exhibit 38, would it  
16 be back up in this area?

17          A.       Yes, sir.

18          Q.       Was the person lying face up or face down?

19          A.       Face down.

20          Q.       Could you tell who it was at that time?

21          A.       No, sir, I could not.

22          Q.       Did you start to approach the person on the  
23 ground?

24          A.       Yes, I did.

25          Q.       In fact, did you communicate to the dispatcher

1 that you had someone down in the back?

2 A. Yes, sir, I did.

3 Q. As you got closer were you able to tell who it  
4 was?

5 A. Yes, sir, I was.

6 Q. How were you able to tell that?

7 A. I saw the patch on his shoulder.

8 Q. The Irving police officer patch?

9 A. This patch right here, sir.

10 Q. What did you do then?

11 A. I told dispatch that we had an officer down.

12 I went and made a quick check of his pulse. I didn't feel  
13 anything. And then I backed off and took cover.

14 Q. Where did you feel of his pulse?

15 A. His wrist.

16 Q. You didn't get any sign of a pulse at that  
17 time?

18 A. No, sir.

19 Q. And why was it that you backed off and sought  
20 cover?

21 A. There was a lot of area I couldn't cover. I  
22 couldn't see. It was an open door and I just wasn't safe  
23 there in the open.

24 Q. At that point in time you had no idea whether  
25 the suspects were still around or not?

1 A. No, sir.

2 Q. Let me show you State Exhibit 58. Does that  
3 show the area where Officer Hawkins was lying?

4 A. Yes, sir, it does.

5 Q. Okay. Now, at that time these orange boxes  
6 weren't located there; is that right?

7 A. That's correct.

8 Q. Did other officers arrive soon after you?

9 A. Yes, sir.

10 Q. Who was that?

11 A. It was Officer Hughes.

12 Q. Okay. What did Officer Hughes do once he  
13 arrived?

14 A. He took up a spot by a trash compactor,  
15 covering an open door.

16 Q. Did Sergeant Norton arrive soon after that?

17 A. Yes, sir, he did.

18 Q. What happened when Sergeant Norton arrived?

19 A. First thing he did is we started doing CPR.

20 Q. Were you able to roll Officer Hawkins over?

21 A. Yes, we were.

22 Q. Okay. Did you help perform CPR?

23 A. Yes, I did.

24 Q. What did you do?

25 A. I was doing the breathing portion.

1 Q. And what was Sergeant Norton doing?

2 A. He was doing the chest compressions.

3 Q. Did you see any signs of life in Officer  
4 Hawkins at that time?

5 A. No, sir.

6 Q. Could you tell or did you see where Officer  
7 Hawkins had been wounded?

8 A. It seemed he had head trauma, but I couldn't  
9 actually see an entrance or exit wounds. That's all I could  
10 tell. It was a lot of blood.

11 Q. Was his face covered in blood?

12 A. Yes, it was.

13 Q. Did the paramedics arrive shortly thereafter?

14 A. Yes, they did.

15 Q. What happened when they arrived?

16 A. They took over the life saving procedures and  
17 I went on perimeter.

18 Q. Did you notice any evidence near Officer  
19 Hawkins' body when you arrived there?

20 A. Yes, I did. It was a revolver.

21 Q. Okay. Let me show you State Exhibit 39. Is  
22 that the revolver that you saw laying out there?

23 A. Yes, sir.

24 Q. Did you at any time move the revolver?

25 A. No, sir.

1 Q. Okay. After they took Officer Hawkins away,  
2 what did you do then?

3 A. I was assigned to work or stand in the  
4 perimeter.

5 Q. Okay. When you were first down trying to aid  
6 Officer Hawkins, did you see whether his handgun was still  
7 in the holster?

8 A. Yes, I did, sir. It was missing.

9 Q. Okay. It was missing out of the holster?

10 A. Yes, sir.

11 Q. Did you know what type of handgun he carried?

12 A. I believe it was a Glock, sir, but I couldn't  
13 be sure.

14 Q. Is that a semiautomatic handgun?

15 A. Yes, sir, it is.

16 Q. And it was missing?

17 A. Yes, sir.

18 Q. Okay. The rest of the evening what was your  
19 assignment out there?

20 A. To stand at the perimeter or watch the  
21 perimeter. I spent most of the time in the front of the  
22 building.

23 Q. Guarded the perimeter of the building?

24 A. Yes, sir.

25 Q. Were you ever -- did you ever interview

1 witnesses, anything like that?

2 A. No, sir.

3 Q. And you never touched any evidence nor  
4 collected any evidence?

5 A. No, sir.

6 Q. For the record this Oshman's located in Dallas  
7 County, State of Texas?

8 A. Yes, sir, it is.

9 MR. SHOOK: We'll pass the witness.

10 CROSS-EXAMINATION

11 BY MR. SANCHEZ:

12 Q. Officer, when you were sitting in the parking  
13 lot there at the Irving Mall, what store were you close to  
14 there?

15 A. I believe it would be the Dillards, sir.

16 Q. So in order for you to get over to where the  
17 Oshman's was, you had to go toward the airport and cross  
18 over Esters or you could go over to Beltline; isn't that  
19 correct?

20 A. Yes, sir.

21 Q. And did you choose going down to Esters  
22 because that was less traffic maybe on that street or was  
23 Beltline busy at the time? Do you recall?

24 A. It's easier to take the service road than to  
25 cut through the mall parking lot. So it's quicker to go



1 down the service road toward Esters.

2 Q. That's the choice you made. Nobody told you  
3 to take that route?

4 A. Yes, sir.

5 Q. And because you took that route, the first  
6 place at the Oshman's you could get to would be the back; is  
7 that correct?

8 A. That's correct, sir.

9 Q. You weren't instructed to go to the back, were  
10 you?

11 A. No, sir.

12 Q. That was just the first possible place and the  
13 fastest place that you could get to; isn't that correct?

14 A. That's correct, sir.

15 Q. Because if you would have taken Beltline, then  
16 the front of the store would have been the closest place to  
17 get to; is that correct?

18 A. Yes, sir.

19 Q. Now, when you were on the phone at the Irving  
20 Mall, do you recall who you were talking to?

21 A. It was an ex-girlfriend.

22 Q. And do you recall at what time you were  
23 dispatched over to the Oshman's?

24 A. Not the exact time, sir, no.

25 Q. Do you recall what time you heard what you

1 thought were fireworks?

2 A. No, sir.

3 MR. SANCHEZ: That's all I have, Your  
4 Honor.

5 MR. SHOOK: We have nothing further,  
6 Judge. May this witness be excused?

7 MR. SANCHEZ: We have no objection, Your  
8 Honor.

9 THE COURT: The witness may be excused.

10 MR. SHOOK: Call Lt. Norton.

11 THE COURT: Let the record reflect this  
12 witness has been sworn.

13 DENNIS NORTON,  
14 having been duly sworn, was examined and testified as  
15 follows:

16 DIRECT EXAMINATION

17 BY MR. SHOOK:

18 Q. Would you tell us your name, please.

19 A. Dennis Norton.

20 Q. And how are you employed, sir?

21 A. I'm a lieutenant with the Irving Police  
22 Department.

23 Q. How long have you been with the Irving Police  
24 Department?

25 A. Twenty-two years.

1 Q. What division are you assigned?

2 A. I'm in the Traffic Division now.

3 Q. Let me turn your attention back to December  
4 24th of 2000 and ask what division you were assigned to at  
5 that time?

6 A. Patrol Division.

7 Q. And at that point in time your rank was  
8 sergeant; is that right?

9 A. Yes, sir.

10 Q. And what particular shift were you working?

11 A. Evening shift.

12 Q. As a sergeant over the Patrol Division, what  
13 were your duties?

14 A. To basically monitor calls for service and  
15 take care of the officers in whatever aspect they would  
16 need.

17 Q. Do you actually go out on patrol yourself or  
18 available to answer calls?

19 A. Yes, sir, I did.

20 Q. And then did you answer calls on a daily  
21 routine?

22 A. Yes, we did.

23 Q. Let me ask you, did Officer Aubrey Hawkins  
24 work under your command?

25 A. Yes, he did.

1 Q. And did he come on duty on that day?

2 A. Yes, he did.

3 Q. Is that a photograph of Aubrey Hawkins we see  
4 to your left?

5 A. Yes, it is.

6 Q. Okay. He was a patrol officer with Irving  
7 Police Department?

8 A. Yes, sir, he was.

9 Q. The evening of the 24th of December 2000, was  
10 Officer Hawkins on duty as an Irving police officer and  
11 acting in his lawful discharge as an official duty?

12 A. Yes, sir, he was.

13 Q. What would Officer Hawkins' duties be as a  
14 patrol officer?

15 A. They would be go out and monitor calls on his  
16 beat and patrol his beat.

17 Q. Okay. Now, I want to turn your attention to  
18 around 6:29 that evening. Let me ask you this first. Do  
19 you recall how long Officer Hawkins had been with Irving  
20 Police Department?

21 A. He had been there about a year and a half.

22 Q. Okay. And then around 6:29, were you  
23 monitoring calls from the dispatcher to the various patrol  
24 officers?

25 A. Yes, I was.

1 Q. Okay. Did a particular call catch your  
2 attention around that time?

3 A. Yes, it did.

4 Q. And what call was that?

5 A. The suspicious circumstance call to Oshman's  
6 Sporting Goods.

7 Q. Had the dispatcher dispatched some units to  
8 this call?

9 A. Yes, she had.

10 Q. The only information you had at that time were  
11 suspicious persons at the Oshman's?

12 A. Yes, sir.

13 Q. Okay. How many units had she dispatched to  
14 the Oshman's?

15 A. Originally two.

16 Q. And was Officer Hawkins one of those units?

17 A. Yes, he was.

18 Q. Once you heard that Officer Hawkins had been  
19 dispatched, did you speak to the dispatcher?

20 A. Yes, I did.

21 Q. And what did you tell her?

22 A. I told her to send some additional units.

23 Q. Why did you want additional units sent at that  
24 time?

25 A. It was a holiday season, closing time for the

1 store, and there was multiple people involved.

2 Q. You felt that you wanted more officers there  
3 to handle that situation?

4 A. Right. I was uneasy about it.

5 Q. How many more units did you dispatch?

6 A. Two more.

7 Q. Did that include Officer Cassout?

8 A. Yes, sir.

9 Q. Did you continue to monitor the situation once  
10 the additional officers had been dispatched?

11 A. Yes, I did.

12 Q. Did you have some concerns as you listened to  
13 the radio traffic?

14 A. It was confusing, but, yes, and I started that  
15 direction.

16 Q. Okay. And you started going that way yourself  
17 in your vehicle?

18 A. Yes, sir.

19 Q. As you headed that way, did you hear Officer  
20 Cassout's transmissions about finding an officer down?

21 A. Yes, I did.

22 Q. And did you -- when you heard that  
23 information, what did you do?

24 A. I increased my response to code 3 and asked  
25 for the paramedics to be dispatched.

1 Q. Is code 3 when an officer puts on his sirens?

2 A. Light and sirens, yes.

3 Q. Lights and sirens. Once you arrived there at  
4 the 'Oshman's, what was going on at the location?

5 A. When I first got there Officer Cassout was out  
6 checking the area to see what he could find.

7 Q. Okay. And did you find Officer Hawkins there  
8 at the location?

9 A. Yes, we did.

10 Q. Where was he lying?

11 A. He was lying in the back loading dock area.

12 Q. I want to show you what's been entered into  
13 evidence as State Exhibit 58. Does that show the area where  
14 Officer Hawkins was lying?

15 A. Yes, it does.

16 Q. Was he lying face down or on his back?

17 A. He was face down.

18 Q. And which direction was his head pointing?

19 A. South.

20 Q. That would be pointing in this direction?

21 A. Yes, sir, towards the loading dock.

22 Q. Once you saw Officer Hawkins there on the  
23 ground, what did you do?

24 A. Myself and a couple of the officers went up  
25 there and turned him over and started CPR.

1 Q. What portion of the CPR did you work on?

2 A. I did the chest compressions.

3 Q. Were you able to find any signs of life in  
4 Officer Hawkins?

5 A. No, sir, not at that time.

6 Q. Did the paramedics arrive soon after that?

7 A. Yes, they did.

8 Q. What happened once they arrived?

9 A. Once they got there on the scene they took  
10 over, started working on the officer, and started working  
11 trauma on him.

12 Q. Was he transported from the scene at that  
13 time?

14 A. Yes, he was.

15 Q. Now, some of these items we see here, were  
16 these items left by the paramedics?

17 A. Yes, sir.

18 Q. This area here where we see a large amount of  
19 blood, is that the area where Officer Hawkins was lying in?

20 A. Yes, it was.

21 Q. Were there some other items laying out there  
22 that you thought was potential evidence in the case?

23 A. Yes, there was.

24 Q. What items were those?

25 A. A handgun, I think a satchel, some type of



1 ammo, and those type things.

2 Q. Did you touch or move any of those items?

3 A. No, sir, we did not.

4 Q. Once Officer Hawkins was taken away, what did  
5 you do?

6 A. We secured the back of the store and started  
7 the perimeter.

8 Q. At the time did you know whether the suspects  
9 were still in the store?

10 A. We weren't sure.

11 Q. You were acting under the assumption that they  
12 were?

13 A. Yes, it was a possibility.

14 Q. In fact, is this one of the officers that we  
15 see here guarding the perimeter or the open doors?

16 A. Yes, sir.

17 Q. After Officer Hawkins was taken away and the  
18 scene was secured, did you come up with a plan to have the  
19 hostages inside the store taken out?

20 A. Yes, sir. The Tactical Team arrived and we  
21 came up with a plan to bring the people out of the store.

22 Q. What was that plan?

23 A. The TACT Team went in and secured the  
24 employees and then brought them to the back door to us.

25 Q. Here out the back?

1 A. Yes, sir.

2 Q. When they were brought out, were -- did you  
3 take precautions not to have them disturb the evidence back  
4 there?

5 A. We brought them around the far side of the  
6 generator there, yes, sir.

7 Q. Okay. Now, you saw Officer Hawkins' car out  
8 there at that time; is that right?

9 A. Yes, we did.

10 Q. Are the Irving police cars equipped with  
11 videotape cameras?

12 A. Yes, they are.

13 Q. And did you make an attempt to or did you  
14 remove the video cassette from Officer Hawkins' car?

15 A. With one of the investigators we removed it  
16 from the trunk.

17 Q. What was your purpose in doing that?

18 A. They wanted to see what they could establish  
19 on the video.

20 Q. Do the officers sometimes record their traffic  
21 stops?

22 A. Yes, they do.

23 Q. Did you learn at a later time that, in fact,  
24 this particular incident was not recorded?

25 A. Yes, sir.

1 Q. Let me show you what has been marked as State  
2 Exhibit No. 59. Is that the tape that was removed from  
3 Officer Hawkins' car?

4 A. I believe it is.

5 Q. Okay.

6 MR. SHOOK: Your Honor, at this time we  
7 offer State Exhibit 59.

8 MR. SANCHEZ: No objection, Your Honor.

9 THE COURT: No. 59 shall be admitted.

10 Q. (By Mr. Shook) Lt. Norton, did you -- every  
11 patrol officer has a handgun with him when they are out on  
12 duty; is that right?

13 A. Yes, sir.

14 Q. Did you consult the records of the Irving  
15 Police Department and determine what type of gun Officer  
16 Hawkins had, as well as his serial number?

17 A. Yes, sir.

18 Q. Let me show you what has been marked as State  
19 Exhibit 62. Does this poster indicate the information you  
20 found on the type of weapon, as well as the gun and serial  
21 number?

22 A. Yes, it does.

23 MR. SHOOK: Your Honor, at this time  
24 we'll offer State Exhibit No. 62.

25 MR. SANCHEZ: We have no objection, Your

1 Honor.

2 THE COURT: No. 62 shall be admitted.

3 Q. (By Mr. Shook) Lt. Norton, State Exhibit 62  
4 shows a Glock Model 17 with CWU717. Could you tell the jury  
5 what type of weapon a Glock is?

6 A. It's a semiautomatic handgun.

7 Q. Lt. Norton, did you have a chance to review  
8 the -- and listen to the dispatch tape of the events as they  
9 occurred, the dispatch of the call to the Oshman's, as well  
10 as the transmissions between the officers?

11 A. Yes, sir, I did.

12 Q. Let me show you a cassette tape that has been  
13 marked State Exhibit 61. I believe you have listened to  
14 this outside the presence of the jury. Was that a copy of  
15 the dispatch tape for the transmissions for the Oshman's  
16 call?

17 A. Yes, sir, I believe it is.

18 Q. Let me show you State Exhibit 756. Is that a  
19 copy of the transcript, an accurate copy of the transcript  
20 of the call, the conversation between the dispatcher and the  
21 police officers?

22 A. Yes, sir, I believe it is.

23 Q. Were you able to identify all the voices on  
24 the tape as being either the dispatcher or the Irving police  
25 officers under your command?

1 A. Yes, sir.

2 Q. And is it a fair and accurate copy of the  
3 dispatch tape?

4 A. Yes, sir, I believe it is.

5 MR. SHOOK: Your Honor, at this time we  
6 offer State Exhibit 61 and 756.

7 MR. SANCHEZ: We have no objection, Your  
8 Honor.

9 THE COURT: State Nos. 61 and 756 shall  
10 be admitted.

11 MR. SHOOK: Your Honor, at this time may  
12 we have permission to publish the tape for the jury?

13 THE COURT: You may.

14 MR. SHOOK: May we pass out copies of  
15 State Exhibit 756 so the jury can follow along?

16 THE COURT: You may.

17 Q. (By Mr. Shook) The voice we just heard, 234,  
18 is that Officer Hawkins?

19 A. Yes, sir, it is.

20 Q. Officer Hawkins has just said, "10-4, I'm  
21 out." What does that mean?

22 A. That means he's checked out at the location.

23 Q. That means he's arrived there?

24 A. Yes, sir.

25 Q. And that was yourself wanting more units

1 dispatched to the Oshman's?

2 A. Yes, sir.

3 Q. Is that the -- what is the dispatcher doing  
4 there?

5 A. She's trying to raise him and check his  
6 status.

7 Q. When they are talking about 34, that's Officer  
8 Hawkins; is that right?

9 A. Yes, sir.

10 Q. Lt. Norton, let me show you a black and white  
11 photograph which has been marked State Exhibit 757. Is that  
12 a photograph of Officer Hawkins?

13 A. Yes, it is.

14 MR. SHOOK: Offer State Exhibit 757 for  
15 record purposes.

16 MR. SANCHEZ: No objection for record  
17 purposes only.

18 THE COURT: State Exhibit 757 for record  
19 purposes only. Jury, what that means is you will not be  
20 able to view that exhibit.

21 MR. SHOOK: I'll pass the witness.

22 CROSS-EXAMINATION

23 BY MR. SANCHEZ:

24 Q. Lieutenant, I notice from the dispatch records  
25 that Officer Silva and Officer Hawkins were dispatched at

1 the same time to that Oshman's; is that correct?

2 A. Yes, sir.

3 Q. Were you able to determine where Officer Silva  
4 was when he received this dispatch call?

5 A. I don't know his exact location, no, sir.

6 Q. Was he close to the area?

7 A. He was not as close as Officer Hawkins, no,  
8 sir.

9 Q. Do you know how long it took him to get to the  
10 Oshman's?

11 A. I would just have to check the times on the  
12 log.

13 Q. Do you have that in front of you right now?  
14 Would you like to refresh your memory and see if you recall  
15 that?

16 A. It probably took him about five minutes. If  
17 the call came out at 18:30, he looks like he's in the area  
18 at 18:36.

19 Q. So it took him about five minutes and it took  
20 Officer Hawkins about how long, do you know? Can you tell  
21 from the dispatch records?

22 A. About 30 to 45 seconds. Apparently he was  
23 fairly close.

24 Q. Did Officer Silva ever make it to the back of  
25 the Oshman's?

1 A. Yes, he did.

2 Q. And do you know -- can you tell by the records  
3 in front of you whether when he arrived other officers were  
4 already there when he arrived?

5 A. We all started showing up about the same time.

6 Q. Now, from hearing this tape here, it seems  
7 like whoever was calling the police had got close enough to  
8 the door to look inside; is that correct?

9 A. Apparently we had several people, a couple of  
10 people, calling.

11 Q. So either people who were parked really close  
12 to the door or somebody who had actually gone up to the  
13 door; is that correct?

14 A. I'm not sure of their distance, sir.

15 Q. But it would be safe to say they were close  
16 enough to where they could actually see something was going  
17 on in there?

18 A. They knew something was going on.

19 Q. And referring to the Good Eats or Spring  
20 Creek, are those restaurants in the same parking lot as the  
21 Oshman's?

22 A. Yes, they are.

23 Q. Are they closer to Beltline than they are to  
24 the Oshman's or how far are they?

25 A. It's about midpoint, but they are probably a



1 little bit closer to Beltline.

2 MR. SANCHEZ: I pass the witness, Your  
3 Honor.

4 MR. SHOOK: That's all we have, Judge.

5 THE COURT: Thank you, Lieutenant, you  
6 may stand down.

7 MR. SHOOK: May this witness be excused?

8 MR. SANCHEZ: No objection, Your Honor.

9 THE COURT: You may be excused.

10 MR. SHOOK: Call Detective Johnson.

11 THE COURT: Have you been sworn?

12 THE WITNESS: Yes, Your Honor.

13 THE COURT: Yes. This witness has been  
14 previously sworn.

15 RANDALL JOHNSON,  
16 having been duly sworn, was examined and testified as  
17 follows:

18 DIRECT EXAMINATION

19 BY MR. SHOOK:

20 Q. Would you tell us your name, please.

21 A. Randall Johnson.

22 Q. And how are you employed, sir?

23 A. By the City of Irving Police Department.

24 Q. And what do you do with the City of Irving  
25 Police?

1 A. I'm a detective.

2 Q. What division are you assigned?

3 A. Crimes Against Persons.

4 Q. What are your duties as a detective in the  
5 Crimes Against Persons Division?

6 A. I investigate homicides, sudden deaths,  
7 suicides, injury to children, shootings, stabbings.

8 Q. How long have you been in that particular  
9 division?

10 A. Since '89.

11 Q. Okay. And how long have you been with the  
12 Irving Police Department?

13 A. Twenty-two years.

14 Q. Let me turn your attention to December 24th of  
15 2000 and ask if you were on duty on that day?

16 A. No, sir.

17 Q. Were you, in fact, working an extra job?

18 A. Yes, sir.

19 Q. While working that extra job, were you  
20 monitoring radio traffic in the Irving Police Department?

21 A. Yes, sir.

22 Q. Did you hear a call go out to an Oshman's or  
23 an incident that occurred at the Oshman's there in Irving,  
24 Texas?

25 A. Yes, sir, I did.

1 Q. What did you do once you heard that call?

2 A. After the call went on and found out that an  
3 officer had been shot, then I talked with my sergeant and he  
4 asked that I respond.

5 Q. Where did you go then?

6 A. I went to the Oshman's.

7 Q. And you went to the Oshman's at that time as  
8 part of your duties as an investigator in the Crimes Against  
9 Persons Division; is that right?

10 A. That's correct.

11 Q. Were you assigned co-lead to that  
12 investigation, along with Jeff Spivey?

13 A. Yes, sir.

14 Q. Once you arrived at the location, what was  
15 going on?

16 A. The employees were still inside the Oshman's.  
17 The Irving police had the Oshman's surrounded. We were not  
18 sure if the defendants were still inside the store or not.  
19 And that was trying to be coordinated, so it would be safe  
20 to enter the store.

21 Q. Were you present when the employees were taken  
22 out?

23 A. Yes, sir.

24 Q. Had you made arrangements to transport the  
25 employees to the Irving Police Department?

1 A. Yes, sir.

2 Q. How were they transported to the Irving Police  
3 Department?

4 A. They -- by the Irving Police Department, they  
5 were all brought down to the Police Department.

6 Q. Okay. What was the purpose for bringing them  
7 down there?

8 A. For interviews and also to look at lineups.

9 Q. Now, did you stay at the scene at that time?

10 A. Yes, sir.

11 Q. Did you keep any of the employees back with  
12 you at the scene?

13 A. Yes, sir, I did.

14 Q. Who was that?

15 A. Wes Ferris.

16 Q. Is that the manager of the -- one of the  
17 managers of the store?

18 A. Yes, sir.

19 Q. And what did you do with Mr. Ferris at that  
20 time?

21 A. I interviewed him.

22 Q. Where did that interview take place?

23 A. Some of it took place outside of the police  
24 car, then eventually because of the weather we got into a  
25 police car and eventually continued on to the police

1 department.

2 Q. What were the weather conditions that evening?

3 A. It was cold and drizzly and rainy.

4 Q. Did you take a statement from Wes Ferris?

5 A. Yes, sir, I did.

6 Q. And at some point in time did you take him  
7 down to the Irving Police Department?

8 A. Yes, sir.

9 Q. What was your purpose in doing that?

10 A. For him to look at a lineup.

11 Q. That evening after this incident, did you  
12 develop seven suspects that could be involved in this case?

13 A. Yes, sir.

14 Q. And did other investigators put together a  
15 photo lineup of those suspects?

16 A. Yes, sir, they did.

17 Q. Let me show you what has been marked as State  
18 Exhibit 45. Is that the type of lineup that was put  
19 together, these black and white photos?

20 A. Yes, sir.

21 Q. Were you present when any of the photo lineups  
22 were shown or did the other detectives do that?

23 A. Other detectives showed the lineups.

24 Q. Were those lineups shown to all the employees  
25 of the Oshman's that were there that evening?

1 A. Yes, sir.

2 Q. And, in fact, were the suspects identified by  
3 various employees that evening?

4 A. Yes, sir.

5 Q. Now, after Wes Ferris looked at the photo  
6 lineups, did you take him back to the Oshman's?

7 A. Yes, sir, I did.

8 Q. What was your purpose in doing that?

9 A. For him to do a walk-through through Oshman's  
10 with us.

11 Q. Did he do that at that time?

12 A. Yes, sir, he did.

13 Q. Were you present when any evidence was  
14 recovered from the Oshman's?

15 A. I was present, but I wasn't right there when  
16 they were actually seizing the evidence.

17 Q. Other officers were in charge of that?

18 A. That's their job to seize the evidence for us,  
19 yes, sir.

20 Q. That would be Officers Hazard and Chism?

21 A. Yes, sir.

22 Q. Did you ever see what was later described as a  
23 smoke grenade or smoke bomb in the Oshman's?

24 A. No, sir.

25 Q. Okay. At a later date did Wes Ferris put

1 together an inventory of the items taken, including the guns  
2 and serial numbers that were taken during the robbery?

3 A. Yes, sir.

4 Q. Did you, in fact, help prepare arrest warrants  
5 for the seven suspects?

6 A. Yes, sir, I did.

7 Q. And did you also include information on the  
8 types of weapons and the serial numbers that were taken?

9 A. Eventually we did have that information, yes,  
10 sir.

11 Q. Was that information disseminated to law  
12 enforcement throughout the nation?

13 A. Yes, sir.

14 Q. Then the next, well, I guess the next month,  
15 were you and Officer Spivey, as well as other officers,  
16 working on various leads that were coming in, in search of  
17 the suspects?

18 A. Yes, sir, we were.

19 Q. Let me turn your attention now to January 22nd  
20 of 2001, approximately almost a month later. Did you on  
21 that date receive information that the suspects had been  
22 located in Colorado?

23 A. Yes, sir.

24 Q. About what time were you notified of that?

25 A. Around noontime of the 22nd.

1 Q. Did you and some other officers then go to  
2 Colorado that day?

3 A. Yes, sir.

4 Q. Which officers accompanied you to Colorado?

5 A. In the plane with me was Detective Jeff Spivey  
6 and also Danny Delight with ATF.

7 Q. About what time did you arrive in Colorado?

8 A. It was in the evening and it was dark.

9 Q. Where did you go?

10 A. To the RV park.

11 Q. What part of Colorado was this? What major  
12 city was near there?

13 A. Colorado Springs.

14 Q. And you, then, after arriving at the airport  
15 in Colorado Springs went to an RV park?

16 A. Yes, sir.

17 Q. What was the name of the town the RV park was  
18 located near, if you recall?

19 A. I don't recall right now, sorry.

20 Q. If you heard the name Woodland Park, is that  
21 familiar?

22 A. It's Woodland Park, yes, sir.

23 Q. How far is Woodland Park from Colorado  
24 Springs?

25 A. I don't know, sir.



1 Q. Was it a short drive? Long drive? Or do you  
2 recall?

3 A. It was a short drive.

4 Q. And could you describe the area of Woodland  
5 Park, what kind of terrain it is?

6 A. It's an RV park and it was hilly and a lot of  
7 trees, snow on the ground.

8 Q. Once you arrived at the RV park, what was  
9 going on at that location?

10 A. There was a lot of police personnel at the  
11 location. The RV had been secured and everybody was -- or a  
12 lot of people were mustering up in one of the rooms up there  
13 to try to coordinate what we were going to do.

14 Q. Had the RV been searched at that point in  
15 time?

16 A. No, sir.

17 Q. Did you assist them in preparing search  
18 warrants for the RV?

19 A. Yes, sir.

20 Q. After you left that location, did you ever go  
21 into the RV that evening yourself?

22 A. Eventually, I went into the RV, yes, sir.

23 Q. Was there a body of one of the suspects  
24 located in the RV?

25 A. Yes, sir.

1 Q. Who was that?

2 A. That was Harper.

3 Q. Larry Harper that we see on State Exhibit 44  
4 there?

5 A. Yes, sir.

6 Q. And where was he lying in the RV?

7 A. By the table on the ground.

8 Q. Did it appear from what you saw that he  
9 committed suicide?

10 A. Yes, sir.

11 Q. After you left the RV park, where did you go  
12 then?

13 A. We then went to the Teller County Jail.

14 Q. Woodland Park located in Teller County,  
15 Colorado?

16 A. Yes, sir.

17 Q. Once you made it to -- what was your purpose  
18 in going to the Teller County Jail?

19 A. Some of the defendants had been arrested and  
20 were in custody in the Teller County Jail.

21 Q. Do you remember which suspects were in custody  
22 in the Teller County Jail?

23 A. It was George Rivas, Michael Rodriguez, Joseph  
24 Garcia, and Randy Halprin.

25 Q. Had they been arrested earlier that day?

1 A. Yes, sir.

2 Q. And taken into custody?

3 A. Yes, sir.

4 Q. And, in fact, did you speak with Michael  
5 Rodriguez that day?

6 A. Yes, sir, I did.

7 Q. And did you take a statement from him?

8 A. Yes, sir, I did.

9 Q. Now, were there two other suspects still at  
10 large at that point in time?

11 A. Yes, sir.

12 Q. And who were they?

13 A. It was Patrick Murphy and Donald Newbury.

14 Q. Did you have any information about any type of  
15 vehicle they might be in?

16 A. I'm not sure at that time, no, sir.

17 Q. Okay. At that time, though, you didn't -- you  
18 didn't know where they were located?

19 A. No. We did not know where they were at.

20 Q. Let me turn your attention, then, to the next  
21 day, which would be, I believe, the 23rd of January. Were  
22 they still at large on -- at that point in time?

23 A. Yes, sir.

24 Q. At some point in time was a van located in  
25 Colorado Springs that Colorado police officers had been

1 looking for?

2 A. Yes, sir.

3 Q. Do you recall what date that was?

4 A. The 23rd, I believe.

5 Q. Okay. And where was that located?

6 A. Where the van was located?

7 Q. Yes, sir.

8 A. I don't recall.

9 Q. In the city itself?

10 A. Yes, sir.

11 Q. Now, where were you staying once you reached  
12 Colorado Springs?

13 A. In a hotel.

14 Q. In Colorado Springs itself?

15 A. Yes, sir.

16 Q. That evening of the 23rd, were you notified by  
17 the police that the suspects Murphy and Newbury may have  
18 been located?

19 A. Yes, sir.

20 Q. And where were they located?

21 A. At the Holiday Inn across the street from the  
22 hotel we were staying at.

23 Q. So just right across the street?

24 A. Yes, sir.

25 Q. Did you and Officer Spivey go over there at

1 that time?

2 A. Yes, sir, we did.

3 Q. What was going on at that particular time?

4 A. Negotiations were going on with two defendants  
5 and the hotel was being secured and people were removed from  
6 the hotel.

7 Q. Now, you and Officer Spivey didn't participate  
8 in trying to secure the suspects at that time, did you?

9 A. No, sir, we did not.

10 Q. You were just observers at that point in time?

11 A. Yes, sir.

12 Q. In the early morning hours around 3:30, did,  
13 in fact, Mr. Murphy and Mr. Newbury surrender to the  
14 Colorado Springs police?

15 A. Yes, sir, they did.

16 Q. Were you present at the hotel when that  
17 happened?

18 A. Yes, sir.

19 Q. Do you see Mr. Murphy here in the courtroom  
20 today?

21 A. Yes, sir, I do.

22 Q. Could you point him out to the jury, please?

23 A. He's sitting at the defense table with the  
24 blue shirt and yellow tie.

25 MR. SHOOK: Your Honor, if the record

1 could reflect the witness has identified the defendant here  
2 in open court.

3 Q. (By Mr. Shook) Did Mr. Murphy look a little  
4 different that day?

5 A. Yes, sir, he did.

6 Q. How did he look different?

7 A. His hair was dyed.

8 Q. Looking at State Exhibit 44, the photograph  
9 there, is that how he appeared on that day?

10 A. Yes, sir.

11 Q. We see a blondish tint to his hair?

12 A. Yes, sir.

13 Q. He also had a full beard that we see in the  
14 photograph?

15 A. Yes, sir.

16 Q. Once he was taken into custody by the Colorado  
17 Springs Police Department, where was he taken to?

18 A. To the Colorado Springs Police Department.

19 Q. Okay. Did you go to their offices at that  
20 time yourself?

21 A. Yes, sir.

22 Q. After you arrived there, did you come into  
23 contact with Mr. Murphy?

24 A. Yes, sir, I did.

25 Q. And where did you meet him?

1 A. In one of their interview rooms.

2 Q. Once you met him, did you introduce yourself?

3 A. Yes, sir, I did.

4 Q. Did you identify yourself as an Irving police  
5 officer?

6 A. Yes, sir.

7 Q. Was there anyone else there with you at that  
8 time?

9 A. Captain Paris.

10 Q. Did you have any weapons on you?

11 A. No, sir.

12 Q. How were you dressed?

13 A. In a suit and tie, but I didn't have a jacket  
14 on.

15 Q. And what was Mr. Murphy's appearance? How was  
16 he dressed?

17 A. I don't recall what his dress was at that  
18 time.

19 Q. Okay. After you introduced yourself and  
20 identified yourself, did you read Mr. Murphy his Miranda  
21 warnings?

22 A. I advised him of his Miranda warnings, yes,  
23 sir.

24 Q. Would you tell the jury exactly the Miranda  
25 warnings you advised him of.

1           A.       Yes, sir. I told Mr. Murphy, I said, you have  
2 the right to remain silent and not make any statement at  
3 all. Any statement you make may and probably will be used  
4 as evidence against you at your trial. You have the right  
5 to have an attorney present to advise you prior to or during  
6 any questioning. If you cannot afford an attorney, an  
7 attorney will be appointed to counsel with you and you have  
8 the right to terminate this interview at any time.

9           Q.       Did Mr. Murphy appear to understand those  
10 rights as you advised him?

11          A.       Yes, sir.

12          Q.       And did he indicate that to you?

13          A.       Yes, sir.

14          Q.       Did he agree to waive his rights and agree to  
15 talk with you?

16          A.       Yes, sir.

17          Q.       After he agreed to talk with you, did you  
18 discuss with him whether he would give you a written  
19 voluntary statement?

20          A.       Yes, sir.

21          Q.       Did he agree to do that?

22          A.       Yes, sir.

23          Q.       Did you talk about the procedures or how you  
24 would take that statement?

25          A.       Yes, sir, I did.



1 Q. What did you ask him in regards to that?

2 A. I gave him the option of either him writing  
3 out the statement or me writing out the statement.

4 Q. And what did he choose to do?

5 A. That I write out the statement.

6 Q. Okay. And what procedure did you use in  
7 writing out the statement?

8 A. I told him that it would be his words on the  
9 statement, that I write slow, and for him to take his time  
10 and that I would have to stop him, let me catch up, and then  
11 we would continue on.

12 Q. So more or less he dictated the statement to  
13 you?

14 A. Yes, sir.

15 Q. You have taken voluntary statements before in  
16 the past; is that right?

17 A. Yes, sir.

18 Q. Is this an unusual procedure that they  
19 actually choose you to write the statement for them?

20 A. No, sir.

21 Q. When you are taking a statement in this  
22 manner, do you -- is it just you writing continuously or do  
23 you stop and ask questions?

24 A. Stop and ask questions and then write down the  
25 words he says.

1 Q. So this type of procedure can take some time;  
2 is that right?

3 A. Yes, sir.

4 Q. Did you begin taking down the statement right  
5 away?

6 A. Pretty close to the beginning of the  
7 interview, yes, sir.

8 Q. Let me ask you this. First of all, did you  
9 later come to know the defendant's complete name as Patrick  
10 Henry Murphy, Jr.?

11 A. Yes, sir.

12 Q. During the interview did you ask him if he  
13 needed any refreshments, anything like that?

14 A. I asked him if he wanted something to drink  
15 and he wanted a Dr. Pepper and that was given to him.

16 Q. So he was allowed a Dr. Pepper?

17 A. Yes, sir.

18 Q. During the course of your interview, did you  
19 allow him breaks to use the restroom or anything else?

20 A. Twice.

21 Q. So twice he was able to take a bathroom break?

22 A. Yes, sir.

23 Q. When you take a voluntary confession or  
24 voluntary statement, the words that are put down in the  
25 statement, are those the words of the suspect in this case,

1 Mr. Murphy's?

2 A. Yes, sir.

3 Q. Whether you believe what is being said or not,  
4 do you just put his statement down?

5 A. It's his statement. It's his words, yes, sir.

6 Q. So all the language contained in the statement  
7 is his version of what he wants put down in his statement?

8 A. Yes, sir.

9 Q. Let me show you what has been marked as State  
10 Exhibit 978. Is this the written statement you took from  
11 Patrick Murphy?

12 A. Yes, sir, it is.

13 Q. Does it indicate on there what time you began  
14 taking the statement from him?

15 A. Yes, sir, it does.

16 Q. What time is that?

17 A. 4:21 a.m.

18 Q. Okay. And what time did you complete the  
19 statement?

20 A. At 7:07 a.m.

21 Q. So this statement took some time to dictate to  
22 you, using the procedure you have already described; is that  
23 right?

24 A. That's correct.

25 Q. And this included the two bathroom breaks,

1 also?

2 A. Yes, sir.

3 Q. The statement consisted of how many pages in  
4 the 'end?

5 A. Nine pages.

6 Q. Okay. And the writing there yourself is  
7 yours. You write pretty small; is that right?

8 A. That's correct.

9 Q. After he completed the statement, did you have  
10 him read over the statement?

11 A. Yes, sir.

12 Q. Did he read all nine pages of the statement?

13 A. Yes, sir, he did.

14 Q. After he read the statement, did he wish to  
15 make any changes or deletions or additions to the statement?

16 A. No, sir.

17 Q. As you were actually taking the statement,  
18 would you have to mark out portions of the statement, if  
19 mistakes were made?

20 A. Yes, sir.

21 Q. And when you do that, what would you have him  
22 do?

23 A. At the end of the statement, then I would go  
24 back and have him initial those mistakes that I made.

25 Q. So he would initial any mistakes or markouts

1 that you made a mistake?

2 A. Yes, sir.

3 Q. After he read it through and was satisfied  
4 with it, what did you do then?

5 A. Then we brought in a civilian witness to  
6 witness the signing of the statement.

7 Q. Okay. And once that civilian witness is  
8 brought in, did Mr. Murphy sign the statement freely and  
9 voluntarily?

10 A. Yes, sir, he did.

11 Q. Did you ever threaten him or coerce him in any  
12 way to get him to sign the statement?

13 A. No, sir.

14 Q. Did you ever promise him any benefit or reward  
15 to try to entice him to sign that statement?

16 A. No, sir.

17 Q. Did he sign the statement in front of the  
18 witness at that time?

19 A. Yes, sir.

20 Q. And would he sign each page?

21 A. Yes, sir, he did.

22 Q. The signature we see at the bottom, that's Mr.  
23 Murphy's signature?

24 A. Yes, sir, it is.

25 Q. Did you also have him sign in another portion

1 of the document?

2 A. Yes, sir.

3 Q. And where was that?

4 A. Under the portion where I wrote down the story  
5 that he wanted to tell in a little blank.

6 Q. What was your purpose in doing that?

7 A. Just so that I cannot add anything else to his  
8 statement without his knowledge.

9 MR. SHOOK: Your Honor, at this time we  
10 offer State Exhibit 978.

11 MR. SANCHEZ: We would just reurge our  
12 prior objection.

13 THE COURT: Objections are overruled.  
14 State Exhibit 978 shall be admitted.

15 MR. SHOOK: May I publish to the jury,  
16 Your Honor?

17 THE COURT: You may.

18 MR. SHOOK: May I have the Court's  
19 permission to pass out copies of the statement, so they may  
20 read along?

21 THE COURT: Yes.

22 Q. (By Mr. Shook) First page of the statement  
23 reads, "Irving Police Department, Irving, Texas, voluntary  
24 statement dated 1-24-2001. Time began 4:21 a.m. Place,  
25 Colorado Springs Police Department. I, Patrick Murphy, am

1 39 years old. Live at NA. I am making this statement to  
2 law enforcement Officer R. D. Johnson, No. 357, who before  
3 he began questioning me, while I was under arrest and before  
4 I began making this statement, warned me first that I have  
5 the right to remain silent, not have to make any statement  
6 at all.

7 "Second, that any statement I make may  
8 and can be used in evidence against me on my trial or trials  
9 for the offense or offenses concerning which this statement  
10 is made.

11 "Third, that I have the right to employ a  
12 lawyer to be present to advise me either before or during  
13 any questioning.

14 "Fourth, that if I am unable to employ a  
15 lawyer, I have the right to have a lawyer appointed without  
16 cost to me to counsel with me and advise me before and  
17 during any questions.

18 "Fifth, that I have the right to stop  
19 answering questions at any time and may stop this interview  
20 or making this statement at any time without answering some  
21 questions or have some statements -- made some statements or  
22 not.

23 "I do not want to talk with a lawyer  
24 before or during the answering of any questions or the  
25 making of this statement and I do hereby knowingly and

1 voluntarily waive and give up my above-explained rights and  
2 I do make the following voluntary statement of my own free  
3 will without any promises or offers of leniency or favors  
4 and through no fear, coercion, or threat of physical harm by  
5 any person or persons whomsoever.

6 "On the 23rd of December we decided to  
7 rob Oshman's in Irving. We were looking for a sporting  
8 goods store with a wide range of weaponry and clothing. We  
9 were trying to increase our arsenal and to get rid of the  
10 weapons we stole from the prison. It was discussed. We  
11 weighed the pro's and con's. What I didn't like was so many  
12 employees. Being familiar to Irving I knew you all's  
13 response was very quick.

14 "There was Larry Harper, Joseph Garcia,  
15 Randy Halprin, George Rivas, Donald Newbury, and myself. We  
16 were pretty much equal. This was at the Econo Lodge in  
17 Farmers Branch. It sat on the west side of the highway that  
18 goes to Lake Dallas. It was one room. Larry Harper rented  
19 the room.

20 "Larry Harper, George Rivas, and Joseph  
21 Garcia went to look at the Oshman's. I wouldn't go. I was  
22 afraid of being recognized. It was a cooperative report  
23 about the layout of the store. They also did an employee  
24 count. It was 15.

25 "We prepared our weapons. We discussed



1 our jobs. Larry Harper and George Rivas posed as security  
2 guards. They were wearing uniforms. We had acquired black  
3 slacks, white shirts, and one of the shirts actually had ADT  
4 Security. I think the ADT shirt came from Goodwill. They  
5 had ballcaps. I think one of the caps said "SECURITY." I  
6 think the other was a black cap. It had a clipboard of  
7 photos from the newspaper and the story was they were there  
8 to interview employees about possibly spotting the suspects.

9 "One of the employees was gathered up --"  
10 I'm sorry. "Once the employees were gathered up in one  
11 place, they realized that they were surrounded by gunmen.  
12 Once the employees were tied and bound, the store was  
13 searched again.

14 "I was in the parking lot. I was in a  
15 blue two-toned Suburban. From the prison we went to  
16 Wal-Mart in Kenedy, Texas. Rivas was driving. I was  
17 approximately 150 yards in front of the door. I was in  
18 front of the K-Mart doors. I was backup and lookout. I had  
19 a little small Radio Shack two way. I also had a Radio  
20 Shack radio scanner. We had bought a book of police  
21 frequencies. It was like a telephone. It came from Radio  
22 Shack. It's in the RV. I looked up Irving police  
23 frequencies and prograded them into the scanner. I did  
24 everything listed for Irving. It was like a dozen  
25 frequencies.

1 "We were just doing radio checks.  
2 Everyone had walkie-talkies. Some had earphones. I was the  
3 only one with a scanner. We went from the hotel room to the  
4 Oshman's. We were all in the Suburban. I parked the truck  
5 in that spot. We watched Oshman's with binoculars. I sat  
6 there about -- we sat there about 20 minutes.

7 "The first two were Michael Rodriguez and  
8 Randy Halprin. They were to go in and act as Christmas  
9 shoppers, getting clothing and loaded up with baskets.  
10 Rodriguez and Halprin walked from the Suburban to the  
11 Oshman's. Five minutes later Garcia and Newbury walked to  
12 the Oshman's. They were gatherers. Approximately five  
13 minutes Harper and Rivas walked to the Oshman's. They were  
14 to pose as security.

15 "I could hear on the radio that they were  
16 gathering up the employees. At this time Harper or Rivas  
17 called me and let me know it was going down. I put them on  
18 the radio, as they moved around the store, but couldn't tell  
19 what was going on. They would occasionally call me and see  
20 if all was okay out front.

21 "I had called them a couple of times, but  
22 there were two vehicles apparently waiting on someone. Dark  
23 gray SUV -- one was with a dark gray SUV. As you look at  
24 the Oshman's, it was to the right on the second row. The  
25 other car was a small white like a Chevelle, parked four or

1 five spaces to the left of the doors.

2 "Rivas came out of the store and actually  
3 went to the white car. They were waiting on an employee.  
4 Later Rivas told me that he went to the car and told them  
5 that he was conducting an employee interview, looking for  
6 shoplifters. They said okay and rolled up the window. He  
7 went from there to the SUV. Rivas said that they had  
8 motioned for him to come over. As he approached the vehicle  
9 and apparently thinking something was wrong, left.

10 "He then had the keys to an employee's  
11 vehicle. It was a truck. Rivas got into the vehicle and  
12 drove it around to the back of the store. I heard Rivas on  
13 the radio say that, 'Let's back it up.' It was about this  
14 time that Rivas saw the -- it was about this time that I saw  
15 the patrol car. It entered from my right. Immediately I  
16 heard on the scanner suspicious activity at the Oshman's.

17 "I got on the walkie-talkie, telling them  
18 to abort, the police were here. I was on the radio  
19 continuously. I never got off the radio. I gave precious  
20 (sic) location of the patrol and the direction he was  
21 traveling. He traveled from my right to my left. He was  
22 just cruising. He passed the Oshman's store and then picked  
23 up speed and went around to the back. I radioed, 'He's  
24 coming around the corner. Leave. Leave.' When I got off  
25 the radio there was no response to my call.

1 "Approximately a minute, maybe not that  
2 long, I was told, I think Harper, to go to the pick-up  
3 point. I started the truck. First I secured my weapons. I  
4 was carrying two .357's with Magnum loads, revolvers. I had  
5 an AR-15 with approximately 60 rounds of ammunition and a  
6 .12 gauge pump with ten rounds. I made sure they were  
7 laying flat on the floor. That took me a minute or two.

8 "Suddenly civilian traffic showed up. I  
9 heard on the radio, Rivas, "Please hurry. I'm hurt." We  
10 all had code names. I was Angel for guardian Angel. Rivas  
11 was chief in Spanish. We tried to use Spanish names to  
12 mislead them. I don't remember Harper. Halprin was rat in  
13 Spanish. One was Guido. Garcia was esse, Spanish for  
14 friend. My main concern was to remember Rivas' and mine.  
15 No one else was supposed to be talking to me. Rivas kept  
16 calling, 'Hurry, Angel, I'm hurt.'

17 "When I went out of my space and drove to  
18 the front of the K-Mart, the squad had stopped in front of  
19 the K-Mart. He got out. He was walking toward the  
20 Oshman's, but he hesitated like he heard something. I  
21 turned left to go out of the parking lot. There was a small  
22 service road at the end of the K-Mart and I turned right. A  
23 cross street, I turned left, went to Beltline, and turned  
24 right.

25 "Rivas is steadily calling me. I told

1 him I was coming. I drove to Pioneer, the next right,  
2 turned right on Pioneer. Went down to the first set of  
3 apartments. On the right I turned into the apartment drive,  
4 left around the office, and then there they were. They were  
5 on the other side of the paneled delivery truck.

6 "I went to the opposite side of the  
7 truck. I got out of the truck. I got into the rear seat  
8 behind the driver of the same truck. My purpose was to, if  
9 pursued by the police, I was to initiate a firefight with  
10 the AR-15.

11 "While changing seats, the other men were  
12 loading the bags in our truck. We left and went back to the  
13 hotel. Rodriguez drove. Randy Halprin and George Rivas  
14 were hurt. Randy was shot in the foot, I think the left.  
15 Rivas was shot twice, once in the stomach and once in the  
16 leg.

17 "We went -- we get back to the motel  
18 room. I had to slap Randy because he was really crying  
19 about his foot. We got two wounded men upstairs. It was  
20 there. It was a three-story hotel. Newbury was trying to  
21 treat their wounds. The rest of us brought up the stolen  
22 merchandise. We realized we didn't have first aid supplies.  
23 I stayed at the hotel as guard. Harper and Garcia left to  
24 get first aid supplies.

25 We cleaned Halprin and Rivas up the best

1 we could. Halprin was shot in the foot. Three of his toes  
2 were damaged. Rivas was shot in the right leg by his groin.  
3 The second shot was in his abdomen, in from the left, exited  
4 the right.

5 "When the supplies came up, we sewed up  
6 Rivas with two stitches to each stomach wound. Rivas and  
7 Harper gave a combined story. The officer came back to the  
8 loading area. It was Rivas or Harper wearing the white  
9 uniform, approached the officer. The officer stopped his  
10 vehicle. Rivas and Harper started to walk around to the  
11 officer's door. The officer, sensing something was wrong,  
12 dove for his shotgun. Rivas or Harper killed the officer.

13 "Some of the others were actually on the  
14 loading dock. Newbury said he was still loading the bags  
15 into the back of the truck. Garcia said he had come around  
16 the door and pulled the officer out of the vehicle. They  
17 had to move the vehicle. Rivas said he removed the  
18 officer's handgun. He said he tried to remove the shotgun,  
19 but couldn't get it to unlock.

20 "All of us had .357s except Rodriguez and  
21 Halprin. At the motel room we gathered all our weapons we  
22 used and did a count. We found out a weapon had been  
23 dropped. It was Rodriguez'. We checked ammo. Halprin had  
24 not fired his weapon. Garcia, Harper, and Rivas' weapons  
25 had been fired. My own weapons were unfired. We thought

1 Halprin had shot our buddies. Newbury's weapons was  
2 unfired.

3 "We did an inventory of the things from  
4 Oshman's. We realized that they had left some ammo bag  
5 behind. We had an argument about that. We had a  
6 walk-through and then everybody had done and realized  
7 Rodriguez had left the bag with ammunition. Myself was  
8 doing weapons. Rodriguez was helping me. Harper was  
9 counting money. Garcia was pulling off sales tags. We  
10 stayed there that night.

11 "We had seen all the publicity on the  
12 news. I think the first count was \$73,000 and some change.  
13 Donald and I almost left that day."

14 Each page signed by Patrick Murphy. You,  
15 yourself, did not conduct the searches at the Colorado  
16 Springs hotel room or that particular RV; is that right?

17 A. That's correct.

18 Q. Were the items seized in that room and in the  
19 RV and in the Jeep that George Rivas was arrested in  
20 eventually turned over to the Irving Police Department?

21 A. Yes, sir.

22 Q. Were you able to account for every weapon that  
23 had been taken from the Oshman's?

24 A. Yes, sir.

25 Q. Were you also able to recover Officer Hawkins'

1 handgun?

2 A. Yes, sir.

3 MR. SHOOK: That's all we have, Judge.

4 We'll pass the witness.

5 THE COURT: Go ahead and take a lunch  
6 break. We'll stand in recess until 1:00.

7 [Jury out]

8 (Recess)

9 [End of Volume]



1 STATE OF TEXAS \*

2 COUNTY OF DALLAS \*

3 I, NANCY BREWER, Official Court Reporter for the 283rd  
4 Judicial District Court, do hereby certify that the above  
5 and foregoing constitutes a true and correct transcription  
6 of all portions of evidence and other proceedings requested  
7 in writing by counsel for the parties to be included in this  
8 volume of the Reporter's Record, in the above-styled and  
9 numbered cause, all of which occurred in open court or in  
10 chambers and were reported by me.

11 WITNESS MY OFFICIAL HAND on this the 4 day of

12 March, 20074

13  
14  
15 Nancy Brewer  
16 NANCY BREWER, CSR, NO. 5759  
17 Expiration Date: 12-31-04  
18 Official Reporter, 283rd JDC  
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